CARD 1

(25,624)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 329.

WILLIAM ALLEN FISHER, APPELLANT,

vs.

NEWTON RULE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 6, 1917.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1916, of said Court, Before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Henry T. Reed, District Judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twenty-second day of July, A. D. 1915, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein William Allen Fisher is Appellant and Newton Rule is Appellee, which said transcript as prepared and printed in pursuance of the præcipe of counsel for appellant under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(*a*)

a (Praecipe as to Printing Record.)

In the Circuit Court of Appeals of the United States, within and for the Eighth Judicial Circuit.

William Allen Fisher, Complainant
vs.
Newton Rule Defendant.

To the clerk of said court:

Please print the record of pleadings, including the exhibits to bill of complaint, in separate certificate filed herein. Also pursuant to the stipulation concerning the record of [vertificate] of evidence, print from the certificate the following: All oral testimony of witnesses, but omitting the objections to questions and the rulings thereon.

Each exhibit offered by Complainant:

The opinion of Honorable Job Barnard given in the Supreme Court of the District of Columbia in the cause entitled

United States on relation of Newton Rule,
No. 56,351. vs. Law.
Franklin K. Lane, Secretary [if] the Interior.

The dismissal of this action consisting of certified copy of order among complainant's exhibits.

Letter of A. A. Jnes assistant Secretary in contest D 20105 dated Feb. 7, 1914.

Telegram of A. A. Jones, assistant secretary to register.

U. S. Land Office Alliance, Nebraska, dated September 2, 1913.

Letter of C. M. Bruce Assistant Commissioner to William Allen Fisher dated January 23, 1914.

ALLEN G. FISHER,
Solicitor for Complainant.

Endorsed: Filed Nov. 16, 1915, John D. Jordan, Clerk.

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b (Stipulation for filing of Additional Transcript.)

In the Circuit Court of Appeals, within and for the Eighth Judicial Circuit of the United States of America.

William Allen Fisher, Complainant, Appellant.
vs.
Newton Rule, Defendant, Appellee.

It is stipulated that appellant may file without notice additional transcript for appeal, which consists of the exhibits to his bill, and which are omitted from transcript for appeal.

It is further stipulated, that appellant has filed in this court, certified by the clerk of district court to be the original, the certificate of evidence below, settled by the trial judge of district court—and that this may be deemed to be portion of the record for purposes of appeal, as fully as if a copy thereof, certified by the clerk of district court had been lodged herein. Dated September 18th 1915.

ALLEN G. FISHER,
Solicitor for Appellant.

A. W. CRITES,
EDWARD D. CRITES,
F. A. CRITES,
Solicitors for Appellee.

Endorsed: Filed Nov. 16, 1915, John D. Jordan, Clerk.

William Allen Fisher, Appellant,
No. 4525 vs.
Newton Rule.

Stipulation for filing additional transcript.

Filed Nov. 16, 1915., John D. Jordan, Clerk.

2 Placita.

United States of America,
District of Nebraska,
Chadron Division—ss:

Pleas lately had and entered of record, in the District Court of the United States of America for Chadron Division, and within and for the District of Nebraska, at a regular

term thereof, begun and held in the City of Chadron, at the County Court House therein, on September 16, 1914.

To-wit: March 29th, A. D., 1915.

Present:

The Honorable Thomas C. Munger,
District Judge Presiding.

R. C. HOYT, Clerk.

WILLIAM P. WARNER,
Marshal,
By A. M. Wright deputy Marshal.

Attest:
R. C. Hoyt, Clerk.
By L. J. F. Iaeger, Deputy.

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3 Be it remembered: That on the 21st day of August, A. D., 1914, a Bill in Equity was filed, with the Clerk of the District Court of the United States, District of Nebraska, within the Chadron Division, Eighth Judicial Circuit, of which the following is, in words, letters and figures, a full and correct copy, to-wit:

4 Bill in Equity.

In the District Court of the United States of America, held within and for the District of Nebraska, Chadron Division.

William Allen Fisher, Complainant,
vs.
Newton Rule, Defendant.

To the Honorable, the Judges of said Court and District:

The bill of complaint of William Allen Fisher, who is a citizen, resident, and inhabitant of Andrews Precinct, Sioux County, Nebraska, against Newton Rule, who is a citizen, resident, and inhabitant of Sioux County, Nebraska, and which relates to the title to the northeast quarter of section twenty two (22) and the north half and the southwest quarter of section twenty-three (23) in township thirty north, of range fifty-five west of the Sixth Principal in Sioux County, Nebraska, within the above named district and division, and which title and the rights of each party hereto is claimed to accrue and does accrue to complainant under the provisions of section 2289 and 2291 inclusive, Revised Statutes of the United States, which bill of complaint shows to the Court that

this is an action relative to real-estate within the said Division, the title whereto has accrued pursuant to the laws of the United States of America in that regard.

1. The Complainant avers that he is the owner [to] the equitable title, and in possession of, the above described real-estate, which ownership, title, and possession accrued to him by reason of the following circumstances:

2. The Complainant avers, that on May 4, 1913, the said real-estate was vacant, unappropriated, surveyed real-estate whereof the title was in the United States Government whereof the records of said Government in its land department and the various offices thereof show the same to be unappropriated, unentered Government land and which was subject to entry under the Homestead laws of the United States, especially sections 2289 and succeeding sections Revised Statutes of the United States and Statutes amendatory thereto; And on May 6, 1913, the said land was yet vacant and yet unappropriated; and on that date the Complainant appeared before the Register of the United States Land Office at Alliance, Nebraska, in which district the said real-estate was and yet is still situate, and offered thereto his application in writing to enter the above described real-estate as a homestead pursuant to the laws of said Country; at that time and ever since complainant was a qualified entryman under the provisions of said statutes, the head of a family, and a native born citizen of the United States of America, and was not the owner of any real-estate in any state or territory and had never previously thereto made entry of any land under the laws of the United States; and at the same time complainant signed a homestead affidavit and non-mineral affidavit relative to said tract of land prepared by the said Register, and subscribed and swore to the same before the said Register and paid to the Receiver of public moneys, at said office, the full sum of fifteen dollars, fees of the United States Land Office and commissions of the Officers therein, and received therefor the receipt of the Receiver of public moneys in connection with the said homestead entry, Serial No. 015938, and that thereupon he entered upon said tract of land, which was unoccupied, and proceeded to purchase lumber and building material and haul the same upon it with his own team and with hired help, and employed carpenters and builders and laid a cement foundation and dug a cellar and thereon erected a frame dwelling house containing three rooms 12x24 feet, including an addition of 12x14 with a porch; and the entire porch and house was thoroughly roofed with shingles and the house is covered with weather boarding, and

inside, with plaster or compo-board; and the house contains six factory doors and six windows, each containing two sashes with glass, and by the said cement foundation the house is firmly attached to the soil so that it is not removable and it is habitable at all seasons of the year, and in and about the erection and completion thereof, including the labor of complainant, he has laid out, paid out, and expended in the erection of said dwelling house the sum of seven hundred dollars; and as soon as the same might be occupied, complainant established his residence thereon and made settlement and purchased furniture, including cooking stove, stove pipe, cooking utensils, bed, bedstead, bedding, and a table and dishes and cutlery, and has cooked, eaten and slept therein until advised by a letter from the General Land Office that he might be excused from further residence therein until further notified, but he has frequently since that time returned unto the said premises and yet remains in possession
6 thereof.

2. The Complainant alleges further that at the time of his filing, there were fences upon said premises and since that, other improvements consisting of a dwelling house had been removed therefrom, and there was not any other habitable place upon the said premises, excepting the dwelling house erected by complainant, and complainant alleges, that at the present time, improvements of said premises cannot be replaced at an expense or cost of twelve hundred dollars, all of which improvements he claims to be his pursuant to the law of the land and the practice and procedure of the land department of the United States.

3. Complainant alleges, that thereafter, pursuant to the laws of the State of Nebraska, this complainant took up animals, the property of this defendant, which were trespassing damage feasant upon said real-estate, and served a notice upon him, to which notice the defendant paid no attention and made no objection and appointed no arbitrator, whereby he confessed and admitted that the possession of said real-estate was in complainant and that the animals of this defendant had damaged complainant in his said lawful possession and occupancy of said premises as enclosed real-estate in the sum of fifty-dollars; but upon a later date, without notice to complainant and without warrant of law, the defendant went before the County Court of Sioux County and sought to perfect an appeal to the District Court of said County, and afterwards, in the said District Court, the proceeding was dismissed upon the motion of defendant claiming that the action was not prosecuted; but complainant al-

leges that the said attempted appeal was without warrant of law and was void, and that the County Court of Sioux County had not, and the District Court of Sioux County had not, jurisdiction in the premises.

4. The Complainant alleges further that the defendant claims title to the said real-estate by virtue of a patent which it is claimed in his above ..... has been issued to the said premises pursuant to a final Register's certificate issued by the Register of the United States Land Office at Alliance, Nebraska, dated May 9, 1914, purporting to make title in the heirs of Hilan N. Rule, deceased, and that this defendant claims to be the sole heir of said decedant, who died July 29, 1904, leaving no wife nor children, but leaving this defendant who claimed to be the father, and a mother
7 and a brother of full age and a sister and brother who were then minors; and that their interest was claimed by them to accrue by virtue of the following facts: That on June 28, 1904, at the local land office in Alliance, Nebraska of the United States, the said Hilan N. Rule, then a resident of the State of Iowa, made homestead application for said premises and thereafter never went upon the land and never made any settlement upon said land and never established any residence upon said land nor made any improvements thereon, and thereby he abandoned his said homestead entry as was afterward determined in a proper proceeding by the Secretary of the Department of the Interior and that the said laches was not cured during his lifetime, nor afterward by anyone in his behalf, nor by any of his said heirs:

5. The Complainant alleges that the defendant Newton Rule, on June 28, 1904, at the United States Land Office, at Alliance, Nebraska, made his homestead entry and received a receipt for, and has since made final proof and received a patent for, and has sold and disposed of, and removed from, 640 acres of land in sections twenty-three (23) and twenty-six (26) town thirty (30), Range fifty-five (55) which homestead entry of the said Newton Rule is immediately contiguous to the described tract of land, which is the homestead entry of complainant and which has been entered by the said Hilan N. Rule, deceased, and in March 1913, after the said defendant had sold his own homestead and removed improvements from the land of complainant above described, and he offered for sale the relinquishment of the said Hilan N. Rule and of himself claiming to be the heir of said Hilan N. Rule and thereby abandoned said tract of land and all his interests therein, and he has no equities whatsoever in relation to the said tract of land.

|—| Complainant alleges further that at the time when said defendant offered his final proof of his homestead entry on the contiguous land, he also published notice and offered proof to the homestead entry of Hilan N. Rule, then deceased, as the heir of said decedant, and that thereupon Allen G. Fisher filed in the land office of Alliance, Nebraska, his affidavit of contest and procured to be issued a notice and thereon he served the said notice upon the father and mother and brothers and sisters of said deceased entryman and a hearing was had between the said Allen G. Fisher and this defendant claiming to be heir, and that such proceedings were
8 had therein that on February 28, 1913, the Secretary of the Department of the Interior sustained the said contest and the allegations thereof and followed the decisions of the Supreme Court of the United States which established the law in relation to the said premises, and said notice, and cancelled the entry of said Hilan N. Rule and awarded to the said Allen G. Fisher, a preference right of entry in the said premises, and while the said entry was cancelled and the said land was vacant and unappropriated, the complainant made his homestead application and entry hereinbefore related. That afterward, the said Newton Rule made his application into the said Secretary for a rehearing and for the exercise of the supervisory authority of said Secretary and claimed to be entitled to equitable considerations pursuant to section 2450 Revised Statutes of the United States, but upon a full hearing taken July 19, 1913, said application of the defendant was denied upon the authority of Adams v. Church decided by the Supreme Court of the United States, reported in 193 U. S. Rep., P. 510, and the authority of the case of Moss v. Dowman decided by the United States Supreme Court and reported in 176 U. S. Rep., page 413; and upon the authority of Whitney v. Taylor, [decised] by the United States Supreme Court and reported at 158 U. S. Rep., P. 85, and the rule whereof has been in full force and effect within the knowledge of defendant since December 19, 1894, and the same rule is yet in full force and effect and has never yet been set aside.

7. Complainant alleges further that in his said decision, the Secretary of the Interior found to be a fact that complainant has placed valuable improvements upon said tract and has both legal and equitable rights thereby.

8. Complainant alleges that thereafter collusion between the law officers of that portion of the land department of the United States which is within the Department of the Interior, this defendant began a proceeding in the Supreme Court of the District of Columbia for the purpose of requiring the De-

partment to reinstate the entry of said decedant and procured an interlocutory order therein but no final judgment. That this order was procured by reason of the failure of the law clerks in the office of the Secretary of the Interior to plead any of the above facts either in favor of Allen G. Fisher, or in favor of complainant, and there was not brought to the notice or knowledge of the said Court the finding of the
9 Secretary of the Interior that your complainant had either legal or equitable rights in said premises, and the said interlocutory order was made by the court without knowledge of the existence of complainant, or of any rights either at law or in equity existing in his favor, nor of any of the facts hereinbefore recited which exist in his favor, nor of any of the acts or doings of complainant, but the law clerks or attorneys appearing on behalf of the land department in said court, and this defendant scrupulously and purposely withheld any information from the Judge of the Supreme Court of the District of Columbia in the action aforesaid, and did not inform the said Allen G. Fisher, nor his attorney in relation thereto until after the giving of the adverse order herein stated, and never gave any notice nor information unto complainant, and the complainant never had any notice nor information thereof until March 20, 1914, when the said action had been dismissed and the unlawful acts hereinafter related had been committed.

9. Complainant alleges further that on or before January 1st, 1914, it was arranged between the attorney of Defendant on the one side, and the attorneys of record for the land department, who were law clerks therein, on the other side, that the said action in the District Court of Columbia should be dismissed, and in consideration thereof, a patent for said premises should be issued unto this defendant, which agreement was unlawful and in violation of the rights both in law and in equity concerning said real estate of complainant and which agreement was void and unlawful because thereby the land department undertook to set aside a rule of property and of interpretation of many years' standing which was [relief] upon by complainant in his entry upon the said tract of land, occupancy thereof, and residence thereon, and the making of the improvements above stated, and complainant alleges that there was not knowledge of said agreement in the complaint, nor his attorney, nor any person else connected with the premises and proceedings.

10. That the fact of the removal of his improvements and of the attempted sale of his relinquishment was never brought to the knowledge of the Secretary of Interior, nor

to said Supreme Court of District of Columbia, which has jurisdiction only as nisi prius Court, and has not superior, or [or] general supervisory jurisdiction.

11. And Complainant says further that by reason of this abandoment of said premises and entry by defendant, his rights became forfeited, and that defendant concealed these facts from the Department of the Interior, all in fraud of the rights of the complainant, and by his exercise of the homestead right in his own behalf on contiguous lands, defendant exhausted his own rights of homestead.

12. Complainant says further, that the statutes and decisions of the State of Nebraska, effective on and ever since June 28th, 1904, and especially since May 6th, 1913, provide that Complainant cannot be deprived of his possession and right to continue in possession of said land and shall not be cut off, and his equities and right to legal title within shall continue and ripen into perfect title, and the beneficial ownership [continu-] unless this defendant shall have paid him the full value thereof, and complainant says this has not been done nor tendered by defendant.

13. That by reason of the premises the Department should not have deeded said land to defendant and by reason of the premises, the defendant took the legal title by collusion, and fraudulent concealment of the right and superior equities of complainant, who is now the [cestique] trust of defendant, and this Complainant in equity is entitled to have a trust declared for him in said premises against defendant.

14. A perfect transcript of the decisions of the land Department declaring the equities of Complainant are filed herewith, made a part hereof, by reference and [market] Exhibit "A."

15. Complainant has no adequate remedy under the strict rules of the Common Law, but only in this Court of Conscience, and the matter in controversy herein exceeds exclusive [if] interest and costs, the sum or value of Three Thousand Dollars.

Wherefore, Complainant prays a restraining order against defendant Newton Rule, forbidding him until the final order herein from seeking in any manner to convey or cloud title to said premises, and from seeking by any act to dispossess Complainant of his complete possession and full enjoyment and occupancy thereof.

That upon final hearing said judgment be made perpetual.

That defendant be decreed to hold title to said premises as naked trustee for complainant, and that he execute said trust to him by suitable conveyance, and for such further relief as is just and equitable and for his reasonable costs.

Complainant prays also a writ of subpoena against said Newton Rule.

WILLIAM ALLEN FISHER,
Complainant.

11 Counsel.

United States of America,
The State and District of Nebraska,
County of Dawes, Chadron Division.

William Allen Fisher of lawful age on oath states that he has read the foregoing Bill of Complaint; that the facts stated therein are true as he verily believes.

WILLIAM ALLEN FISHER.

Sworn to and subscribed before me this .. day of July, 1914.

(Seal) O. B. UNTHANK,
Notary Public in and for said County.

My Commission expires. .....

Filed at 9 A. M. Aug. 21, 1914. R. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy.

11a (Exhibit "A" to Bill of Complaint, Decisions of the Secretary of Interior.)

Fisher vs. Heirs of Rule.

Decided February 28, 1913.

Death of Homestead Entryman—Rights of Heirs.

Where a homestead entryman dies without having established residence upon his entry, the entry thereupon terminates, and his heirs succeed to no rights whatever in the land.

Effect of Original Homestead Entry.

The making of an original homestead entry amounts to no more than a declaration by the claimant of intention to acquire title to the land in the manner prescribed by the statute, and bears substantially the same relation to the final acquisition of title as does the declaratory statement to purchase under the preemption law—no vested right being acquired by either as against the government.

Death of Entryman—Residence—Act of June 6, 1912.

The second proviso of section 2291, Revised Statutes, as amended by the act of June 6, 1912, does not change the law as it had theretofore existed, except to specifically relieve those succeeding to an entry, upon death of the entryman, from the requirement of residence upon the land.

Adams, First Assistant Secretary:

Allen G. Fisher has appealed from the decision of the Commissioner of the General Land Office, dated September 27, 1911, affirming the action of the local officers and dismissing his contest against the homestead entry made on June 28, 1904, by Highlan N. Rule, for the N.E.¼, and N.½ and S.E.¼, Sec. 23, T. 30, N., R. 55 W., Alliance, Nebraska, land District.

The affidavit of contest charged, in substance, that Highlan N. Rule died without having established residence upon said homestead, leaving as his heirs, his father, mother, two brothers and a sister; and that no settlement upon the land had been made by any person.

It appears from the record that the entryman, an unmarried man, died on July 29, 1904, leaving, as his heirs, father, mother, brothers and a sister, as alleged in the affidavit of contest. He had not then established residence on nor done anything in the way of cultivating or improving the land. These are the controlling facts in the case and no consideration will be given to the attempt, by the father for the other heirs, to acquire title to the land by less than three months residence thereon, coupled with certain improvements and the cultivation of a part of the tract.

11b Section 2291, Revised Statutes, requires residence and cultivation by a homestead entryman for five years immediately succeeding the time of the filing of the affidavit provided for in section 2290, Revised Statutes. That the entry was not subject to forfeiture, under section 2297, Revised Statutes, at the date of the entryman's death, does not [altar] the fact that he was then in total default, as to compliance with the homestead law. Indeed, section 2297, Revised Statutes, reiterates the requirement of section 2291 that the establishment of residence upon the land shall immediately follow the filing of the affidavit. It is true that, ordinarily, no disadvantage would accrue, provided the entryman established actual residence within the six months period but such delay is at his peril and if, as in this case, death intervenes, that fact cannot be pleaded in lieu of compliance

with law in the matter of residence. It follows, therefore, that the death of the entryman, which rendered such compliance impossible, terminated the entry, for, the Department must hold that, under fair construction of section 2291, Revised Statutes, where an entryman dies without having established residence upon his homestead, his heirs succeed to no right whatever in the land, since it contemplated a succession by the widow, heir, or devisee to the right to complete a claim initiated not alone by the filing of the affidavit but by immediate and actual settlement in compliance with the law. Indeed, the making of an original homestead entry amounts to no more than a declaration by the claimant of intention to acquire the land in the manner prescribed by the statute, and bears substantially the same relation to the final acquisition of title as does the declaratory statement to a purchase under the preemption law. By neither the one nor the other is any vested right acquired as against the Government. See Whitney vs. Taylor (158 U. S., 85, 95). Following the uniform rule of cases adjudicated under the preemption law, it must be held that, under the homestead law, a declaration of intention, never acted upon, to acquire public land by residence thereon, confers no heritable right to complete the entry without settlement on the land.

In this connection, it is not inappropriate to refer to the second proviso of section 2291, Revised Statutes, as amended by the Act of June 6, 1912 (Public, No. 179) which reads as follows:

> Provided, that when a person making entry dies before the offer of final proof, those succeeding to the entry must
> 11c show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved of any requirement of residence upon the land.

Said Proviso, part of an act passed to relieve and not to increase the burdens of homestead entrymen, did not change the law as it had theretofore existed, except to specifically relieve those succeeding to an entry from the requirement of residence upon the land. In other respects, it is a more legislative declaration of the requirements of the old law.

In accordance with the views above expressed, the decision of the Commissioner of the General Land Office is reversed and the entry cancelled.

11d Fisher vs. Heirs of Rule (On Rehearing).

Decided July 19, 1913.

Homestead—Death of Entryman—Rights of Heirs.

The homestead law contemplates that its benefits shall be confined to actual settlers and their statutory successors; and where an entryman dies without having established residence, the entry thereupon terminates and his heirs succeed to no rights under the entry.

Valid Entry Essential Basis for Homestead Patent.

A Valid entry of record, asserted by the entryman or his statutory successor in interest, duly qualified, is the essential basis for a homestead patent, and supposed equities growing out of mistaken or illy considered decisions of the land department will not warrant the issuance of patent in the absence of proper legal foundation.

Death of [Entruman] Without Residence—Cultivation by Heirs

Where a homestead entryman dies without having established residence, and his heirs thereafter cultivated the land, they do not thereby acquire any legal or equitable right which would warrant the land department in issuing patent to them for the land.

Preference Right of Contestant.

Any question as to the preference right of a successful contestant to make [antry] of the land on controversy can only arise in connection with an application by contestant to exercise such right, and can only be raised by some one asserting a superior right to enter the land.

Jones, First Assistant Secretary:

Newton Rule, as heir at law of Highlan N. Rule, deceased, has invoked the exercise by this Department of it supervisory authority on behalf of his claim to the NE. ¼, Sec. 22, and N. ½ and SE. ¼, Sec. 23. T. 30. N., R. 55 W., 6th P. M., Alliance Nebraska, land district, under and by virtue of the homestead entry, made by his deceased son, Highlan N. Rule, on June 28, 1904.

In its decision of February 28, 1913, (42. L. D., 62) cancelling this entry, the Department, after finding that Highlan N. Rule, died thirty-one days after making said entry without having established residence upon the land or done anything in the way of cultivating or improving the same, held

as follows Section 2291, Revised Statutes, requires residence and cultivation by homestead entryman for five years immediately succeeding the time of the filing of the affi-
11e davit provided for in section 2290, Revised Statutes.

That the entry was not subject to forfeiture, under section 2297, Revised Statutes, at the date of the entryman's death, does not alter the fact that he was then in total default as to compliance with the homestead law. Indeed, section 2297, Revised Statutes, reiterates the requirement of section 2291 that the establishment of residence upon the land shall immediately follow the filing of the affidavit. It is true that, ordinarily, no disadvantage would accrue, provided the entryman established actual residence within the six months period, but such delay is at his own peril and if, as in this case, death intervenes, that fact can not be pleaded in lieu of compliance with law in the matter of residence. It follows therefore, that the death of the entryman, which rendered such compliance impossible, terminated the entry, for, the Department must hold that, under any fair construction of section 2291, Revised Statutes, where an entryman dies without having established residence upon his homestead, his heirs succeed to no right whatever in the land, since it contemplates a succession by the widow, heir, or devisee, to the right to complete a claim, initiated not alone by the filing of the affidavit, but by immediate and actual settlement in compliance with the law. Indeed, the making of an original homestead entry amounts to no more than a declaration by the claimant of intention to acquire the land in the manner prescribed by the statute, and bears substantially the same relation to the final acquisition of title as does the declaratory statement of a purchaser under the preemption law. By neither the one nor the other is any vested right acquired as against the Government. See Whitney vs. Taylor (158 U. S., 85, 95). Following the uniform rule of cases adjudicated under the preemption law, it must be held that, under the homestead law, a declaration of intention, never acted upon, to acquire [publi] land by residence thereon, confers no heritable right to complete the entry without settlement on the land.

A motion for rehearing of the decision of February 28, 1913, was denied by the Department on April 17, 1913.

It is urged in the pending motion (1) that the decision of February 28, 1913, is not warranted by the homestead law; (2) that, even if that decision be correct, it reverses a long line of departmental decisions, upon the faith and credit of

which Newton Rule has acted; and (3) that Fisher is not entitled to a preference right under the act of May 14, 1880 (21 Stat., 140)

11f The principle announced by the Department in this case is not, as is assumed by Counsel for Rule, a sudden and capricious interpretation of the homestead law by the land department but the deliberate judgment of the Supreme Court of the United States. Not only has that court held from the beginning that the purpose of the homestead law is, as was expressed in the title of the act of May 20, 1862, (12 Stat., 392), "To secure homesteads of actual settlers upon the public domain," but it has expressly excluded from the benefits of the law all persons except actual settlers and their statutory successors. "The Policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the Government" Adams vs. Church (193 U. S., 510, 516). See also Moss vs. Dowman (176 U. S. 413).

In the case of Moss vs. Dowman, supra, the Supreme Court, after emphasizing the fact that only actual settlers are beneficiaries under the homestead law, held:

Counsel say that "a prima facie valid entry of record operates to appropriate the land covered thereby and to reserve it, pending the existence of such prior entry, from all subsequent disposition"; that by analogy to express statutory provisions, a homestead entry without settlement is adjudged to be operative for six months; * * *

We deem it unnecessary to consider the correctness of these rulings or the power of the land department to secure to one who has made a formal entry a certain length of time in which to perfect his settlement and improvement. The revised Statutes in terms give no such right.

It is true that section 5 of the act of May 20, [1962], c. 75, 12 Stat. 392, 393, [carred] into the Revised Statutes as section 2297, provides—"If at any time after the filing of the affidavit, as required in section 2290, and before the [xpiration] of the five years mentioned in section 2291 it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

But that section simply authorized the Government to annul an entry if thereafter it appears that the home-
11g steader has actually changed his residence or abandoned the land for more than six months. But the very phraseology, "Changing residence", "abandoning land", implies a settlement on the land which is changed and abandoned, and does not authorize a waiting for settlement and occupation. On the other hand, section 2291, Rev. Stat., providing for final proof, requires an affidavit that the [application] has "resided or cultivated the same for a term of five years immediately succeeding the time of filing the affidavit." In other words, the one section contemplates an immediate settlement and occupation, and the other provides temporary abandonment.

* * * * * * *

Whenever a homestead entry has been made, followed by no settlement or occupation on the part of the one making the entry, and that homestead entry has by lapse of time of relinquishment, or otherwise, been ended, any one in actual possession as a settler and occupier of the land has a prior right to perfect title thereto.

This case of Moss vs. Dowman arose in the Courts after this Department had, on December 19, 1894, rendered decision in favor of Dowman, holding that Moss's claim, as well as the other preceding heirs, was invalid, because the entryman had never established residence on the land after making their entries. The Supreme Court of the United States thus sustained the Department in its conclusions.

The correctness of this rule is not only apparent, but it must at once be seen that it is a wise one. Were this not the law, A could make homestead entry for a valuable tract, never go upon the land, nor establish residence thereon, nor do anything whatsoever toward complying with the homestead law, and having relinquished within a day less than six months after making entry, B could make entry, and following A's example, never go upon the land, nor establish residence, and so on, until the speculative scheme could be matured by the sale of a relinquishment to a bona fide homestead settler, at a large price; all clearly in violation of the principles of the homestead law enacted for the purpose of securing homes for actual settlers at a minimum cost and not to provide a method of speculation, whereby bona fide settlers could be prevented from going on the public lands and making a home, without paying a large price for the privilege

vouchsafed the settler by the law. Indeed, this feature was adverted to by the Supreme Court of the United States in the Moss-Dowman case, and it was [conclusively] shown that section 2297, Revised Statutes, relied on here by Rule, has no application whatsoever.

11h

So, when Highlan N. Rule died without having established residence upon his homestead, he was, as the Department has heretofore held, in default, and his incoate right, if any such right existed to complete the entry by residence and cultivation, died with him, there being no statute providing for succession to a mere declaration of intention never acted upon. Death in such case is a relinquishment and extinguishment of the entry, and the land reverts to the public domain. The requirement of the law that there should be five years' residence and cultivation immediately following the date of the filing of the homestead application became impossible of fulfillment when the entryman died. Whatever equity, if any, Newton Rule acquired by subsequently placing improvements upon and cultivating the land is in his own right and not as an heir at law of his deceased son. It appears of record that he has perfected a homestead entry for 640 acres of land and has therefore no further standing under the homestead law.

With reference to the claim made by Newton Rule for equitable consideration in this case, it must be remembered that the jurisdiction of the land department to issue patents, "upon principles of equity and justice, as recognized in Courts of equity," is dependent upon section 2450, Revised Statutes, and the regulations thereunder.

Not only is there no regulation that would warrant the issuance of patent in this case, but the department, as a court of equity, would be powerless to make a rule or regulation that would sanction the patenting of public lands without warrant of law and in the teeth of the decisions of the Supreme Court of the United States interpreting the law. A valid entry of record asserted by the entryman or his statutory successor in interest, duly qualified, must be the basis of patent in homestead cases and supposed equities growing out of mistaken or illy-considered departmental decisions do not obviate the necessity for a legal foundation for patent.

The decisions of the Department in the case of Moss vs. Dowman and of the Supreme Court, above referred to, were rendered prior to the entry involved in this case, and they remain as authoritative statements of the law, binding the department, as well as the parties in the case.

The pending motion need not, however, be determined
11i by such general consideration, nor the relief sought confined to the issuance of a patent to the lands involved. The record discloses that the father of the entryman, who is also his heir at law, made homestead entry for 640 acres of contiguous land upon the very day that Highlan N. Rule entered the tract here in question. It is impossible to believe that Newton Rule was misled by or relied upon the Departmental decision in the case of Heirs of Stevenson vs. Cunningham (32, L. D. 650), or the other cases cited in the brief filed by his Counsel, in view of the fact that soon after the death of the son, he went upon the land embraced in the latter's entry and remained thereon until six months from the date of said entry when he removed to his own land. Not only is it clear that he knew that the letter, as well as the spirit, of the homestead law, as interpreted by the Supreme Court, demanded residence by some one asserting claim as a prerequisite to title under the homestead law, and made a pretence of following the rule laid down by the court, but it is evident that his stay upon his son's claim was a merely colorable compliance with the requirement of residence upon his son's land at a time when the law required his presence upon his own. If, as the Supreme Court held in Moss vs. Dowman, supra, the Revised Statutes gives a homestead entryman no right to delay for six months the establishment of residence, the waiver of this objection and passing to patent of the father's entry is, in itself, a broad exercise of the supervisory authority of this Department. Morever, his alleged expenditures in buildings and fences and breaking 40 acres of land do not represent a total loss to him. Those amounts may be held, not unreasonably, to be fairly offset by nine years' use of the land for cultivation and the grazing of seventy five head of cattle; and it would appear that a part of the fence claimed to have been erected around the [son'] claim is on a line of his own land.

Whether Fisher did or did not earn a preference right of entry by the prosecution of this contest is a question that has no bearing upon the issues involved. As was held by the Department in its decision of April 17, 1913, the question of

preference right can only arise in connection with the application presented by the contestant in the assertion of a claimed preference right through his contest. This follows the uniform current of departmental decisions construing said act of May 14, 1880, morever the question can be raised only by a party who asserts a superior right to enter the land.

11j In this connection, however, it may be observed that Fisher's claim of preference right is challenged solely upon the ground that he refused to pay for testimony as to facts which were established or were wholly irrelevant to the question involved in the case. There is, upon the face of this record, no evidence that Fisher refused to pay for any testimony that it was not the duty of the local officers, under Rule of Practice 38, to exclude.

It can make no difference to Rule who may hereafter enter the land; he is only concerned with the question as to whether he may be allowed to acquire it. Fisher's claim of preference right by virtue of his contest has no bearing on the validity of Rule's claim.

Fisher, however, on the face of this record, was entitled under the law itself to a preference right, to enter this land on the cancellation of Rule's entry, and it is represented in corroborated affidavit filed on behalf of Fisher's son that he and two other parties made entry for the land in contest, after the cancellation of Rules entry, and that Fisher has placed valuable improvements upon the tract, thus he and the other two [entryman] have both legal and equitable rights to be considered.

The Motion is denied.

11k United States of America,
District of Nebraska,
Chadron Division—ss.

I, R. C. Hoyt, Clerk of the District Court of the United States for the District of Nebraska, do hereby Certify the foregoing to be a true and correct copy of a Bill of Equity Exhibit "A" in a cause heretofore pending in this court wherein William Allen Fisher was Complainant and Newton

Rule, was Defendant as the same appears of record in my office.

Seal
U. S. Dist. Court
Dist. of Neb.
Chadron Division.

Witness my hand and the seal of said Court at Chadron, Nebraska in said district this 28th day of July, A. D. 1915.

R. C. HOYT, Clerk,
By L. J. F. Iaeger, Deputy.

Documentary
Stamp
Cancelled
July 28, 1915.

4,000 wds. $6.00
Ctf. .35
Stamp .10

$6.45

Filed Nov. 16, 1915. John D. Jordan, Clerk.

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13 (Restraining Order, August 14, 1914.)

In the District Court of the United States of America. Held in and for the District of Nebraska, Chadron Division.

William Allen Fisher, Complainant,
vs.
Newton Rule, Defendant.

On this 14th day of August 1914, comes the complainant in the above entitled cause and files a showing by affidavit that Hon. W. H. Munger, one of the Judges of the District Court of the United States for the District of Nebraska, is physically unable to perform any official duties at this time and that Hon. Thomas C. Munger, one of the Judges of said Court, is now absent from the District of Nebraska, and also shows by affidavit that the defendant Newton Rule is not to be found in Sioux County in the State of Nebraska, the place of his former residence, and that his present residence or location can not be ascertained, and thereupon it is ordered that the application for a temporary writ of injunction in said cause be set down for hearing before the undersigned at Council Bluffs, Iowa, at my Chambers, on Tuesday, August 25, 1914, at ten o'clock A. M. on five days notice to the defendant by posting in three public places in said County of Sioux and State of Nebraska, and it clearly appearing from specific facts shown by the verified bill that immediate and irreparable loss or damage will result to the applicant before

the matter can be heard on notice, it is ordered that pending the hearing on said application for a temporary writ of injunction the defendant Newton Rule be and he is hereby restrained from seeking in any manner to convey or cloud the title to and from seeking by any act to disposses complainant of his complete possession and full enjoyment and occupancy of the lands and premises described in the Bill of Complaint herein, to-wit: The N. E. ¼ of Section 22 and the N½ and the S. W. ¼ of section 23 in Township 30, North of Range 55, west of the 6th P. M. in Sioux County, Nebraska.

WALTER I. SMITH, Judge.

14 Endorsed: Filed, at 9 A. M. August 14th, 1914. R. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy.

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16 (Answer, filed in the District Court on September 7, 1914.)

To the Honorable, the Judges of the District Court of the United States, within and for the District of Nebraska:

Now comes the above named defendant, Newton Rule, by Albert W. Crites, his solicitor, and for his answer and defense to the cause of action set forth in the bill of complaint filed herein, says that said bill of complaint fails to allege any matter of equity entitling the Plaintiff to the relief prayed for therein, and particularly, that said complainant is entitled to have the patent set aside for the land described in said bill of complaint.

And for further answer to said bill of Complaint, and particularly to the first paragraph thereof, this defendant denies that said complainant is owner of the equitable title or in possession of the said real estate described in said bill of complaint, and described as follows, to-wit: The North east quarter of section twenty two (22), and the north half and south west quarter of section twenty three (23), in township thirty (30) north of range fifty five (55) west in Sioux County, Nebraska, but this defendant avers and respectfully shows the Court that he was the father and sole heir-at-law of Hilan N. Rule, who on the 28th day of June, A. D. 1904, at the Alliance Land Office made original homestead entry No. 011837, of the land above described; that on the 29th day of June, A. D. 1904, the said Hilan N. Rule while preparing to settle upon said land fell sick and of said sickness [dies] intestate, without wife or issue of his body him surviving, whereby this defendant became and was sole heir as aforesaid to his estate, and by reason whereof the said land de-

scended to this defendant, subject to his further compliance with the requirements of the homestead laws of the United States relating to the cultivation and improvements of lands on the public domain entered under said laws;
17 that thereafter, and within six months after the date of said homestead entry, this defendant made settlement, residence, improvement and cultivation on said land, as required by the homestead laws of the United States. That he continued such settlement, residence, improvement and cultivation for five years and more, whereby he became and was entitled as such heir-at-law to a patent in fee simple of said lands, and thereupon, in due form, he made his final proof thereon, of such settlement, improvement and cultivation at the Alliance, Nebraska, Land office, [whers] said lands were subject to entry under the laws of the United States; that thereupon, one Allen G. Fisher, who is now acting as solicitor for the said Complainant, filed in said Land Office, his certain contest against the entry of the said Highlan N. Rule on the ground among other things, that the said Highlan N. Rule had departed this life without having made residence upon said land, and said contest came on to be heard in said Land Office upon his evidence, no evidence having been received from this answering defendant in said contest because the said Allen G. Fisher, failed and refused to pay the cost of writing the same, upon the hearing of said contest; that the Register and Receiver of said Land Office decided said contest in favor of this defendant whereupon said Allen G. Fisher, appealed to the Honorable, The Commissioner of the General Land Office, who, upon due consideration of the evidence, affirmed said order of said Register and Receiver, and did dismiss said contest, and thereupon, the said Allen G. Fisher, again appealed to the Honorable the Secretary of the Interior, and on the 28th day of February, A. D. 1913, the Assistant to said Secretary of the Interior reversed both of said former decisions of the Register and Receiver of said Land Office, and held that the death of the said Highlan N. Rule before he established residence on said land, did terminate said entry, and that his heirs-at-law succeeded to no rights whatever, in said land; that thereafter, this defendant filed his motion for a re-hearing and re-examination of said decision, which motion, on the 17th day of April, A. D. 1913, was denied by said Assistant Secretary; that on the 13th day of May, A. D. 1913, this defendant filed before the said Secretary of the Interior, his petition for relief, which on the 19th day of July, A. D.

1913, was denied by said Assistant Secretary; that prior to said decision of February 28th 1913, and ever since the
18 year 1875, the Commissioner of the General Land Office and the Secretary of the Interior consistently, continuously, and uninterruptedly held and decided that upon the death of a homesteader within six months after entry, and before establishing residence, his rights in the homestead entry taken by him, passed to his heirs, and they could complete title and secure patent to said lands by cultivating and improving the same without residence upon it, and that these rulings constituted a rule of property for more than thirty seven years, upon which this defendant had a right to rely, and that by reason of the death of said entryman, and the improvement and cultivation of said lands, by this defendant, as required by the homestead Laws of the United States, this defendant had and acquired a vested right interest, title and ownership to said lands, which it was the duty of the said Commissioner of the General Land Office and of the said Secretary of the Interior to enforce, and which right the said Secretary of the Interior could not deprive this defendant of, by reversing the decisions made by his predecessors in office, thereby depriving this defendant of his said vested rights and interest in and to said lands, that it was not competent for the said Secretary of the Interior to entertain or to sustain the said contest and to cancel said entry or direct its cancellation or to deny the several motions presented by this defendant, and by reason of the refusal of the said Allen G. Fisher to pay the costs of writing said testimony of this defendant upon the hearing of said contest, it was not competent for the said Commissioner of the General Land Office, or for the said Secretary of the Interior to sustain said contest, and cancel said entry, nor to apply a different rule from that followed by his predecessor in office making retroactive so as to deprive this defendant of his right to a patent, he having submitted final proof of his settlement, improvement and cultivation of said land, which proof has been finally approved by the said Commissioner of the General Land Office, thereby entitling this defendant to a patent thereof; that thereupon, this defendant brought his [vertain] suit in mandamus in the Supreme Court for the District of Columbia against the said Franklin K. Lane, as such secretary of the Interior, setting forth said facts and praying that a peremptory writ of mandamus go out against said secretary commanding him to reinstate said entry and to enforce the rights of this defendant therein, and that
19 such proceedings were had and taken in said Court in said cause, that an answer to the relation was filed by

said Secretary, to which this Plaintiff relator therein demurred and demurrer coming on to be heard in said Court, was sustained by the Court and a writ of mandamus granted, compelling and requiring said action, which ruling and decission the said Secretary of the Interior did acquiesce in and did reinstate said entry, and did direct that the said final proof made by this defendant be approved and accepted and a patent issued to him for said lands; that on or about the 7th day of February, A. D. 1914, the said Secretary of the Interior directed that said Allen G. Fisher be allowed to show cause why his contest should not be dismissed and the said entry of Rule reinstated and passed to patent, to which notice the said Allen G. Fisher, did duly respond, and upon due consideration of the same, the said Secretary of the Interior vacated his former decision, cancelling said entry, dismissed the contest for the said Allen G. Fisher, rejected all conflicting applications and reinstated the entry of this defendant and directed the issuance of a patent to him of said lands, and the said Commissioner of the General Land office, was ordered to take appropriate action in the light of said decision; that on the 9th day of May A. D. 1914, pursuant to said several orders, the said Register & Receiver did issue and deliver to this defendant, his certain homestead certificate entitling this defendant as heir of said deceased, to receive a patent for the lands above described; that thereafter, a patent thereof running to the heirs of Highlan N. Rule and [grating] to them, the title to said land in fee simple, was issued and delivered to this answering defendant and recorded by him in the office of the County Clerk of said Sioux County, Nebraska, whereby he became and was seized and possessed of the absolute title in fee simple to said lands, and of the absolute right to hold, use and occupy the same.

And this defendant further answering says, that during the pendency of said several motions and proceedings before said Secretary of the Interior, the said Plaintiff, William Allen Fisher, then being a minor under the age of twenty one years, and not being the head of a family, presented his affidavit and application to the Register and Receiver for a homestead entry upon said lands, but said application was rejected [fro] the reason among others, that the said Plaintiff was not a qualified entryman under said homestead laws, and for the purpose of qualifying him or attempting to do so, the said Allen G. Fisher, caused and procured the said Plaintiff to apply to the County Court of Dawes

County, Nebraska, where all of said family then resided, for leave to adopt a younger brother of the said Plaintiff, aged about eight years, with the intent and purpose of qualifying said Plaintiff to enter said lands as a homestead entryman; but the said application to enter said land by said Plaintiff was wholly denied and has never been passed to entry and no right has ever been acquired to said land by him thereunder and no right could be acquired by him adverse to the title, ownership and right to the possession of this defendant.

And for answer to the second paragraph of said complaint, this answering defendant [days] that neither on May 6th, 1913, when as said complainant alleges he applied to enter said land, nor at any time thereafter was said land vacant and unappropriated under the homestead laws of the United States nor was the said Plaintiff at that time a qualified entryman under the provisions of said laws for the reason that he was then a minor, and unmarried, and not the head of a family, and that all of the acts set forth as done by him in said paragraph by way of an attempt to make settlement, residence, improvement of said lands, and cultivation thereof, were void and of no effect, and that in truth and in fact the said complainant never made any residence thereon, and never was excused from making residence, and is not now and has not been in possession thereof.

And further answering said complaint, the said defendant admits that said complainant did take up animals belonging to and being the property of this defendant, claiming that they were taken while trespassing damage feasant upon said real estate, and he did cause said cattle to be appraised by arbitrators and did apply to the County Judge of said Sioux County, Nebraska for execution, but this answering defendant appealed from said award to the District Court of said County of Sioux, where said proceedings were wholly dismissed; that no appeal has been taken therefrom to the Supreme Court of the State of Nebraska, which said judgment and order is now in full force and effect, wholly unreversed or modified.

21 And for a further answer to the allegations of the fifth paragraph of said complaint, this defendant says that the allegations contained in said paragraph are not sufficient to constitute a cause of action, either in whole or in part in favor of said complainant and against this answering defendant.

And further answering said complainant, and particularly the 8th paragraph thereof, this answering defendant says that said paragraph fails to allege any matter of equity entitling

the said complainant to any part of the relief prayed in his said petition; that the same is scandalous, untrue, and [contemptous] of the Supreme Court of the District of Columbia and of the Assistant Secretary who made said decision and ought to be stricken out of said complaint.

Wherefore: This answering defendant prays that said bill of complaint be wholly dismissed; that this defendant have a decree forever quieting and establishing in him as against said complainant, the title, ownership and right to possession of said lands, and that he be adjudged to be the absolute owner, thereof, and for such other and further and different relief in the premises as may be just and equitable.

NEWTON RULE,
Defendant.
By Albert W. Crites,
His Solicitor.

The State of Nebraska,
The County of Dawes—ss.

Albert W. Crites, being duly sworn, on oath deposes and says: That he is the duly employed and authorized solicitor for said defendant and he makes this verification in his behalf, that he has read and knows the contents of the above and foregoing answer, and that the facts stated, and allegations therein contained are true, as affiant verily believes, that the said defendant, Newton Rule, is now absent from said County and State, which is the reason why affiant makes this verification, and further affiant sayeth not.

ALBERT W. CRITES.

Subscribed in my presence and sworn to before me this 8th day of September, A. D. 1914.

(Seal)

L. J. F. IAEGER,
Clerk District Court.

22 Endorsed: Filed September 7, 1914. R. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy.

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24 Decree.

In the District Court of the United States for the District of Nebraska, Chadron Division.

William Allen Fisher, Complainant,
vs.
Newton Rule, Defendant.

This cause came on to be heard at this term, and is argued by Counsel, and thereupon the cause is submitted for further

consideration, and now on this day it is ordered, adjudged and decreed by the Court that Plaintiff's bill be, and the same is hereby dismissed at his costs, taxed at $...., and execution is awarded therefor, and it is further ordered adjudged and decreed by the court that the prayer of the defendant's answer, praying for affirmative relief be, and the same is hereby dismissed without prejudice to a future suit for want of jurisdiction of this court to grant such further relief, to which said several decree the Plaintiff and defendant each duly except.

THOS. C. MUNGER,
Judge.

The Clerk will enter the above decree.

.....
District Judge.

Endorsed: Filed at 3 P. M. Mar. 23, 1915. R. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy.

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26 (Assignment of Errors, filed June 8, 1915.)

And now on this ..... day of ....., 1915, comes the Complainant, by his solicitor, Allen G. Fisher, and says that the decree entered in the above cause and filed therein on the 23rd day of March, 1915, in Journal A, at page 398, in said Court and Division, is erroneous and unjust to complainant;

1. The Court erred in ordering, adjudging and decreeing that the Complainant's bill be dismissed.

2. The court erred in holding in effect that the complainant was not the owner of the equitable title of the land described in Complainant's bill, to-wit: the Northwest quarter of section twenty two, and the North half, and the south west quarter of section twenty three, in township thirty North, range fifty five west, sixth principle meridian, in Sioux County, Nebraska.

3. The Court erred in holding in effect that the Plaintiff's title and right to said lands has been adjudicated and adversely determined against him by the Secretary of the Interior.

4. The Court erred in giving any force and effect to the proceedings and pretended judgment of the Supreme Court of the District of Columbia, referred to in the pleadings in this cause, for the reason that said Court was wholly without jurisdiction of the parties, and the Complainant not being a party to said proceedings was not and could not be bound in law thereby.

5. The Court erred in not giving force and effect to the findings and adjudication of the Secretary of the Interior and the decisions of the land department, which sustained the contest of Allen G. Fisher, applicant for filing on the lands in dispute, said decision having sustained the contest
27 of the said Allen G. Fisher, resulting in holding that said lands were subject to entry with a preferential right in favor of the said Allen G. Fisher for the period of 30 days after the final decision in said contest.

6. The Court erred in ruling in effect that said decision of the Secretary of the Interior and the land department of the United States, in favor of said Allen G. Fisher in said contest proceedings, was subject to review by the Supreme Court of the District of Columbia, by proceedings set forth in the pleadings in this case.

7. The Court erred in not giving full force and effect to the decision of the land department of the United States and the Secretary of the Interior in cancelling the entry of Hilan N. Rule and making the land in question subject to entry.

8. The Court erred in holding as a matter of law that it was not necessary for an applicant filing upon a homestead under the laws of the United States to establish a residence thereon prior to his death as a condition to the right of his heirs to perfect said homestead entry and the title thereto under the homestead laws of the United States.

9. The Court erred under the issues and pleadings in not ruling that the paper title in the defendant Newton Rule by reason of the patent issued to him by the Government of the United States and by reason of the evidence and pleadings and issues joined, was not held by said Rule in trust for the Complainant and for his benefit.

10. The Court erred in refusing to require the defendant to execute by suitable conveyance the title to said premises to the complainant.

11. The Court erred in not finding and decreeing that the proceedings of the Supreme Court of the District of Columbia, referred to in the Pleadings, were void and of no force and effect, said Supreme Court being without jurisdiction to determine and direct the conduct of the Secretary of the Interior in regard to the subject-matter of said suit.

12. The Court erred in not finding and decreeing that the pretended judgment and decree and proceedings of said Supreme Court of the District of Columbia were void and of

no force and effect as against this complainant, for the reason that said proceedings were in effect exparte affecting the vested rights of the complainant, the complainant
28 having no opportunity to present his rights and interest before said court and having no notice or knowledge of said proceedings, thereby being [deprieved] of a vested right secured to him under the laws of the United States, by reason of the contest of said Allen F. Fisher and the opening of said premises to settlement freed from the entry of the said Hilan N. Rule, deceased.

13. The Court erred in not decreeing and awarding to the Complainant the real estate mentioned in said Complainant's bill of Complaint.

Wherefore, Complainant prays that the foregoing assignment of errors may be made and appear of record and the same is hereby presented to the court that such disposition be made thereof as is in accordance with law, and further prays a reversal of said order and decree, and that such a decree be entered as will give to the complainant full and complete justice and equity in the premises.

ALLEN G. FISHER,
Solicitor for Complainant.

Endorsed: Filed June 8, 1915 at 9 A. M. R. C. Hoyt, Clerk, By L. J. F. Iaeger, Deputy.

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30 Petition For Order Allowing Appeal.

The above named Complainant, conceiving himself [agrieved] by the decree made, entered and filed on the 23rd day of March, 1915, in the Chadron Division of the United States District Court for the District of Nebraska, in Journal A, on page 398, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the [Eight] Circuit, for the reasons specified in the assignment of errors which is filed herein, and further prays that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the [Eight] Circuit.

Dated this 26th day of May, 1915.

ALLEN G. FISHER,
Solicitor for Complainant.

Endorsed: Filed at 9 A. M., June 8, 1915. R. C. Hoyt, Clerk, By, L. J. F. Iaeger, Deputy.

30b (Order allowing Appeal, June 8, 1915.)

On this 28th day of May, 1915, the above named complainant having duly filed and presented to the court his assignment of errors, together with a petition for an order allowing an appeal, and the Court having duly examined and considered the same hereby grants said petition and hereby allows said appeal and orders that a transcript of the records, proceedings and papers under which said order and decree was made, be duly authenticated and sent to the United States Circuit Court of Appeals for the Eighth Circuit, and that the Appellant give bond with approved surety in the sum of $500.

THOS. C. MUNGER,
District Judge of the District [—] of the United States for the District of Nebraska.

Filed June 8, 1915.

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32 (Citation.)

The United States of America. To Newton Rule—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, wherein William Allen Fisher is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable the Judges of the District Court of the United States for the District of Nebraska, this 2nd day of June A. D. 1915.

THOS. C. MUNGER,
United States District Judge,
District of Nebraska.

June 12th due and legal service hereof admitted of true copy hereof.

ALBERT W. CRITES,
Solicitor for Defendant.

Endorsed: Filed in the District Court on June 4, 1915.

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34 (Bond on Appeal.)

Know All Men By These Presents:

That we, William Allen Fisher, as principal, and John G. Fisher of Sioux County, Nebraska and Allen G. Fisher, of Dawes County, Nebraska, are held and firmly bound unto Newton Rule in the full and just sum of Five Hundred Dollars to be paid to the said Newton Rule his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our [hersi], executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 31st day of May A. D. 1915.

Whereas, lately at the September term A. D. 1914 of the District Court of the United States for the District of Nebraska, in a suit depending in said Court between William Allen Fisher, as Complainant against Newton Rule as defendant to-wit: On March 29th 1915, judgment in said cause dismissing the bill of complainant was given and judgment for costs. Plaintiff and defendant, was rendered against the said complainant, and the said Complainant has obtained an appeal of said Court to reverse the decree in the aforesaid suit, and a Citation directed to the said Newton Rule, defendant, citing and admonishing defendant to be and appear in the United States Circuit Court of Appeals for the [Eight] Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the Condition of the Above Obligation is Such, That if the said William Allen Fisher, Complainant, shall prosecute said appeal to effect, and answer all damages and costs if Complainant fail to make good his said plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and Delivered in Presence of

(Seal) WILLIAM ALLEN FISHER,
(Seal) JOHN G. FISHER,
(Seal) ALLEN G. FISHER,

Approved by
Thos. C. Munger, Judge.

Endorsed: Filed 9 A. M. June 4, 1915. R. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy

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36 Justification of Surety.

State of Nebraska,
County of Dawes—ss.

John G. Fisher, and Allen G. Fisher, each for himself being duly sworn, says that he is a proposed surety for William Allen Fisher, in the above entitled action, and that he is a resident and freeholder of Sioux County, that he has each a freehold estate in land situate in said County, of the value of $3000.00 free from liens and incumbrances thereon, and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in Sioux or Dawes County, the sum of $1000. over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situated in said State the sum of $1000.00 over and above all liens and incumbrances thereon, and beyond all his debts and liabilities, and exclusive of property exempt from execution. That each is resident of the State of Nebraska.

ALLEN G. FISHER,
JOHN G. FISHER.

Subscribed to before me, and signed in my presence this 31st day of May, A. D. 1915.

(Seal) FREDERICK S. BAIRD,
Notary Public.

Endorsed: Filed June 4, 1915. R. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy.

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38 (Praecipe for Transcript on Appeal.)

To the Clerk of said Court:

Please make up transcript

Bill in Equity

Answer

Restraining Order

Decree

Petition for Appeal

Assignment of Errors

Citation

Bond

In the above entitled cause

Dated this 26 day of May, 1915

ALLEN G. FISHER,
Compts. Sol.

Filed May 27, 1915. R. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy.

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39 (Clerk's Certificate to Transcript.)

United States of America,
District of Nebraska,
Chadron Division—set.

I, R. C. Hoyt, Clerk of the United States District Court, District of Nebraska, Chadron Division, do hereby certify that pursuant to the order of Court and in compliance with the Praecipe, a copy of which is found on Page 38 hereof, the foregoing record has been made; and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said court as mentioned in said Praecipe, and as indicated in the foregoing index, in the case of William Allen Fisher, Complainant, against Newton Rule Defendant No. 5 Equity Docket, and that a copy of the Citation

duly certified has been lodged and remains in my said office as such clerk. The original of which is herewith transmitted. Also the original certificate of evidence.

Seal
U. S. Dist. Court
Dist. of Nebraska,
Chadron Division.

Witness my hand and the seal of said Court, at Chadron, in said District, this 9th day of June, A. D. 1915.

R. C. HOYT,
Clerk.
By L. J. F. Iaeger,
Deputy.

Documentary
Stamp
Cancelled
June 21, 1915.

Words, 8,300	$12.45
Ctf.	.35
Seal	.10
	$12.90

Paid 6/21/15. D. C. Hoyt, Clerk. By L. J. F. Iaeger, Deputy.

Filed Jul. 22, 1915. John D. Jordan, Clerk.

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40 (Statement of Evidence, filed by Stipulation of Parties in Circuit Court of Appeals on November 16, 1915.)

Note: The paging in parenthesis throughout this Statement of the Evidence refers to the pages of the original Certificate of Evidence from which the following portions have been prepared pursuant to praecipe of counsel.

In the District Court of the United States for the District of Nebraska, Chadron Division.

William Allen Fisher, Plaintiff,
vs.
Newton Rule, Defendant.

(Certificate of Judge.)

Pursuant to the stipulation of the parties, and in conformity with equity rule 75, I hereby certify that all material evidence offered by either party on the trial of the above entitled suit, is herein set forth in simple and condensed form and the statement is true, complete and properly prepared.

THOS. C. MUNGER.

(Page 40.)

(Stipulation as to Statement of Evidence and for Approval thereof.)

(Page 41.) May 13, 1915, The complainant's solicitor having made amendments in pen upon the proposed certificate of evidence, according to the oral suggestions of defendant's solicitor, and the same having been further examined by such defendant's solicitor, it is now agreed by the solicitors for each party that the said certificate may be signed and certified by the trial Judge as containing all the material evidence offered by either party, and with all exceptions asked.

ALLEN G. FISHER,
Solicitor for Complainant.

ALBERT W. CRITES,
Solicitor for Defendant.

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41 (Testimony for Complainant.)

(Page 43.) JUDGE WOOD, being duly sworn and examined, testified as follows:

Q. You are the Register of the U. S. Land Office at Alliance, Nebr? A. I am.

Q. Pursuant to the subpoena out of this court dated Nov. 24th, 1914, have you received direct from the Commissioner of the General Land Office the records requested therein.

A. I have.

Q. And are these they? A. They are.

Q. I offer in evidence, under seal of the General Land Office dated Nov. 23, 1914, to the record in the General Land Office of the United States. The Complainant offers in evidence contest affidavit in contest 7881, U. S. Land Office at Alliance, received in file there June 22, 1910, serial No. 01827.

The complainant offers in evidence another paper in the same serial number and the same contest file in the U. S. Land Office, August 8, 1910, which is a protest by Allen J. Fisher against the lands of the final proof.

The complainant offers in evidence, in the same serial number the testimony of the plaintiff ruled upon final proof which was sworn to August 15, 1914, before Judge Wood in the Alliance Land Office.

The complainant offers in evidence, the decision and opinion of the Secretary of the Interior in the same case, given February 28, 1913, and reported in 42 land decisions at page 62. Also the ruling of the same office dated April 17, 1913,

which is reported in 42 land decisions at page 64. Also the ruling on a motion for rehearing dated July 29th, 1913,
42 and also the order of the Secretary denying a second (Page 43.) petition for the exercising of supervisor authority dated Nov. 3, 1913, and also the ruling of the Secretary's office in the same case dated Feb. 7, 1914. and [and] the later one dated April 4, 1914, which is published in 43 land decisions.

(Page 44.) Complainant offers in evidence from this same record, his letter to the Commissioner of the General Land Office dated November 30th, 1913.

In connection with the last offer I offer the letter of the General Land Office to the complainant dated Jan. 23, 1914.

Complainant now offers in evidence his receipt from the Receiver of Public Moneys at Alliance, dated May 6, 1913 of a cancellation fee in contest 7881 for a homestead application for this tract of land.

By Attorney Fisher: Judge Wood, I call your attention to this paper and look at the signature to this receipt and state if you are familiar with that hand writing.

A. I am.

Q. You may tell the court whose hand writing it is.

A. It is the signature of H. J. Ellis, receiver of the Land Office district of Alliance, Nebr.

Q. Now I ask you to state whether or not the land therein referred to was or had been cancelled by the cancellation notice and order of the Commissioner, which cancellation notice is referred to in this same official receipt.

A. The paper would indicate that it was cancelled at that time according to the custom of the office.

By Judge Crites:

(Page 44.)

43 Q. Mr. Woods this is a paper that was delivered to Wm. A. Fisher at the time that he tried to make homestead entry on the land referred to, is it not?

A. Yes, it is a receipt from the receiver issued in all cases where money is paid.

Q. This cancellation fee refers to a cancellation fee of some other entry does it not?

A. Yes sir. Cancellation of entry in relation to [land] that are mentioned in receipt or part of them.

ALLEN G. FISHER.

Q. State your name, age, residence and business.

A. My name is Allen G. Fisher; my age is 51, my residence is Chadron Nebr. I am practicing law.

Q. State if you are acquainted with and related to the complainant in this case?

A. I am the father of the complainant.

Q. State whether or not he is a native born citizen of the United States.

A. Complainant was born in Chadron Nebr. and his parents were both native born citizens of the U. S.

Q. Are you acquainted with the land in controversy.

A. I am acquainted with the land in controversy and have known it since the summer of 1904.

Q. Are you the same Allen J. Fisher who filed contest 7881 which has been given in evidence. A. I am.

Q. When were you notified of the cancellation of that entry pursuant to that contest?

A. By telegram from my Washington Attorney, H. J. Guerny, Esq.; on May 3, 1913.

Q. And when did you receive an official notification from the Alliance, Nebr. land office?

(Page 45.)

44 A. During the next succeeding week.

Q. State whether or not you offered a homestead filing on this tract of land pursuant to your preference right.

A. I did offer such filing and received the receipt for it from the Alliance, Nebr. land office under date of June 6, 1913.

Q. Do you know the value of the real estate in controversy in this suit?

A. I do, both from my own acquaintance with the land and from the testimony concerning its value which Mr. Rule, the defendant, gave in my presence on the trial of a suit against the County of Sioux, for taking a portion of this land for roads.

Q. State what Rule's valuation was of this land.

A. Fifteen dollars per acre.

Q. What, in your judgment, is a fair cash and market value of this land at the time when this suit was filed?

A. I own land of my own of which I have talked with people who reside closer to the land than that and I have talked with real estate dealers in Harrison, Nebr. County seat of Sioux County, and with other people who have bought and sold land there.

Q. State what was the fair market and cash value of this land at the time this bill was filed in August 1914.

A. In my opinion it was worth eight to ten dollars per acre and it is a desirable piece of land.

Q. Calling your attention to the case referred to in the land decision of the Secretary of the Interior as a mandamus suit which was the case of the U. S. ex rel. Newton Rule vs. Franklin K. Lane, Sec't of the Interior, I will ask you to state whether you have examined the original records of that case in the office of the clerk of the Supreme Court of the District of Columbia.

(Page 45)

45 A. I have.

Complainant now offers in evidence, a certified copy under the seal of that court, of the dismissal of this action.

Q. State what the fact is as to your having in March 1914, pursuant to an order filed as showing against this dismissal, of this contest by the Sec'y of the Interior.

A. On March 13? 1914, my Washington Attorney, H. J. Guerny, Esq. filed a written showing that the Secretary of the Interior caused the dismissal of my successful theretofore contest against this land referring to 7881, Serial No. 011827.

Q. At the time of making this showing, did you have any conversation with any of the attorneys in the Department of the Interior relative to land matters and then concerning the case of U. S. [es] rel. Newton Rule vs. Franklin Lane?

A. I did.

(Page 46.)

Q. With whom did you talk?

A. I talked principally with C. E. Wright Esq., who is Assistant to Hon. Preston West, Asst. General Attorney for the Department of the Interior. I also talked with George H. Gardner, another assistant to Mr. West, and I had a brief conversation with Mr. West, and I found among the file of this contest, a letter written by Mr West. The Attorneys who represented the Secretary in this mandamus case were P. C. Weston, whom I have mentioned, C. E. Wright, whom I have also mentioned, and Mr. Clements who is not now and was not in March 1914, attached longer to the Department but who was an Attorney of record in that case.

Q. State what was said between Mr. West and yourself relative to this contest Serial 011825 and the mandamus case of Rule against Lane.

(Page 46)

46 A. I found Mr. West a very busy gentleman, as of necessity he would be, and briefly called his attention to his letter written some days before that time which I found among the files, to the effect that they intended to dismiss the contest.

I remonstrated against requiring me to make a showing for the purpose of persuading the Secretary's office not to decide against me when it had already made its mind to decide against me and Mr. West had so written and he told me that the other Attorneys to the record would explain to me about it as he was then very busy. I then with Mr. Guerry, my attorney, called upon Mr. Wright, whom I found in the other office of Mr. West's, and Mr. Wright said to me in substance that after the department's demur to the petition for mandamus had been overruled, the Department had proposed to Samuel Herrick, Attorney for Mr. Rule, that if he would dismiss the application for mandamus that he would dismiss my contest and pass the land to patent.

Q. You may state whether or not there were other papers filed by you in this contest which had no part in this record.

A. Yes sir, among others was an affidavit by Wm. Fisher showing that Rule had offered to sell him the improvements upon this land and permit Fisher to get a filing upon it ahead of my preference right. The conversation took place after Feb. 19, 1913 and before May 6, 1913, when the cancellation order was entered as shown by the affidavit between Rule and this Wm. Fisher after the Secretary had decided in my favor Feb. 19, 1913, and before May 6, 1913 when the cancellation was entered on the records.

Complainant offers in evidence the subponea of this court to the Hon W. W. Wood, Register of the U. S. Land

(Page 46.)

47 Office at Alliance, Nebr. for the production of the contest record in the case of Fisher against the heirs of Rule of the General Land Office and Department of the Interior, to which he responded by producing the records.

Q. You may state if you know whether or not at any time there was any notice to Wm. A. Fisher, the complainant, from the office of the Secretary of the General Land Office relative to any of these proceedings.

A. I know that there was not that the Department Attorneys did not deem Wm. A. Fisher entitled to notice of the proceedings in my contest involving this land 7881 or Serial No. 11825.

I was told this in a conversation with either Mr. Gardner or Mr. Wright at a time when I called their attention to the fact that there is in this record affidavit showing that improvements had been put upon this land in June 1913 by the complainant herein, my son.

(Page 47.)

Q. (By Judge Crites of Attorney Fisher) With reference to exhibit 3. Are you not aware, if you examined all the paper as you should, that there was two relations filed in this matter?

A. I did not look at the record of the other.

Q. How did you know which of these related to?

A. It related to the later one.

Q. If you did not look at the first one how did you know it did not relate to it?

A. Because it was later in date and in file as the clerk told me. I only examined the pleading in one case and that is in the case in which this dismissal was filed because I saw the dismissal and the demur.

Q. Will you swear that this copy that you have presented here related to the one that was dismissed or to the other one?

A. I find in the record of the land office, produced by

(Page 47.)

48 Judge Wood a paper which is entitled "Petition for Mandamus", a true copy test, J. R. Young, Clerk, which is in a form by Samuel Herrick, Council of Law, in the Supreme Court of the District of Columbia the U. S. ex rel. Newton Rule vs. Franklin K. Lane, Sec'y of the Interior, dismissed Nov. 3, 1913; which is also notice served on August 29th, 1913, and it is stamped on it.

Also a file marked Department of the Interior, received August 29th, 1913. That was the first one, the other one dated Jan. 16th is of necessity of a later date and is the second one.

That has stamped upon it No. 56141 and the document which I have offered in evidence of a later date is 56351 so that it is of a later date and later serial number.

Q. Is it not a fact that on March 3, 1914, you received by telegram, at New Castle, Wyo., from the Sec'y of the Interior, or a Mr. A. A. Jones, a certain telegram notifying you that ten days additional time had been given to you to show cause why?

A. Yes sir.

Q. You did receive such a telegram?

A. I did. Pursuant to that I went to Washington showing that I had filed on March 13th.

Q. I understood you to testify in your direct examination that you received no such notice.

A. I did not; what I did say was that my complainant, my son, received no notice of this proceeding.

Q. Did you not say that you did not receive it?

A. I received this notice by telegram at New Castle about the 2nd of March 1914. I arrived home on Sunday night after at six o'clock and did not see my son. I took the next train out of town so that I arrived at Washington on the afternoon of the 12th. I did not get back home here until after the 20th. I, [probally] got back to Chadron on the 22nd or 23rd of March and did not see my son until that time from before the 1st of March.

(Page 47.)

49 I talked with either Mr. Gardner or Mr. Wright, the Attorney I have mentioned, about this and they knew, as I knew, that the record did not show any notice had been served, and they claimed he was not entitled to any according to the ruling.

Q. What right had he for having any notice given?

A. He was entitled to a notice because there was on file in this contest proof that he offered a filing and that he had followed that up by making a settlement upon the land and building improvements there and that consequently he was a party interested and the decisions of the Secretary of the Interior recognizes that fact, that is, the decision of the Asst. Secretary given in July 1913, recognizes that fact and by reasons of his improvements, he had equities in this land which were superior to those of Rule.

Exhibit A to the Plaintiff. Bill contains in it a copy of a decision of the Interior Department which was decided July 19th 1913. It is published in 42 land decisions at page 64 and which is the case of Fisher against the heirs of Rule of a rehearing.

Q. That is the Law which is referred to, [bases] for the statement you have made, is it?

A. I said he was entitled to a notice of the proceeding in this contest case.

Q. On the 6th day of May 1913, how old was Wm. Fisher?

A. He was between twenty and twenty [—] years.

(Page 48)

Q. Then he was not a qualified entryman?
A. He was.
Q. Was he a married man?
A. He was not.
Q. What children was he taking care of?
A. Some time prior to that he had adopted my youngest son, his younger brother.

(Page 48)

50 Q. Will you swear that on the 6th day of May that Wm. A. Fisher was the guardian of anybody?
A. No he was not the guardian of anybody.
Q. What was the purpose?
A. It was for the purpose of providing for this son which was before the land had been cancelled.
Q. The application of Wm. Fisher was not presented at the Local land office May 1913, and at that time he was not qualified to make an entry for any land.
A. He was.
Q. He was not married?
A. He was the head of a family.
Q. Who were the members of his family?
A. The members of his family were myself and my son Charles Fisher.
Q. Will you testify that he had adopted this younger son and that there was a legal paper in this boy's adoption case that was on file the 6th day of May 1913?
A. No sir, I think not. It is not necesary to file any.
Q. Upon what ground was it rejected?
A. It was rejected, in the opinion which the court is laying down, for the reason that they rejected this entry intact and dismissed my contest.
Q. How old was this little brother of the complainant at the time of this proposed adoption?
A. Eight years old.
Q. Had he been making his home with you?
A. He was and has been all the time.
Q. The complainant then has never taken him into the family except by means of adoption.
A. That is all.
Q. What is the complainants business or what did he have at that time?

(Page 48)

51 A. At that time he owned some live stock and other things to file on this land and ready to become a homesteader.

Q. Where was his property at that time, his live stock [ect.]? A. At the ranch which belongs to my other son.

Q. Some four miles away from this?

A. Yes.

Q. So far as you know then he never did anything for this little boy except to go to the County Judge and sign the adoption papers? A. That is all.

Q. What has he been doing since then?

A. He came back here to be here Nov. 23rd where he had taken some horses to sell.

Q. I think that was John.

A. No sir my son Allen. He has been doing some work at Casper, and around other places.

Q. Then do you mean to say that you do not know in a general way what your boy is doing?

A. I know that he was working in the vicinity of Casper for some time in April or May. I do not remember when he came back.

Q. He never had a home while he had a home on this land? He has not stayed there over one day in fifteen.

A. He has been away from Chadron a considerable more than one day out of fifteen.

Q. Have you ever seen this house?

A. No unless it could be seen from a road a long ways off.

Q. You have never been inside the house?

A. No sir.

Q. You testified in your direct, if I remember rightly, that he had made residence on this land. What did you mean by that?

A. I meant that I was told by him and his brother and other men that he had lived there.

(Page 48)

52 Q. You say now that you never was at the house?

A. No sir. All [heresay],

Q. Did you know that it was [heresay] when you testified?

A. Yes.

(Page 49)

Q. You made application for this land, you say?

A. I did.

Q. Did you go down there?

A. No sir, I swore to it before Judge Slattery.

Q. You knew at the time that Wm. A. Fisher had made application and had been rejected?

A. It had not been sustained, in my knowledge.

Q. What was your idea for making application for land when you knew that Allen had made similar application?

A. I was advised by my Washington Attorney that an objection was being made to his application and as the decision gave me preference right, I tendered this filing.

Q. What was your idea in attempting to make an entry on this land when you knew that the complainant had attempted to do the same thing?

A. I have already stated my answer to the last question that I was advised by my Washington Attorney that an objection had been made to his qualification and that I had better do the filing myself.

Q. Is it a fact that you claimed preference right in your contest? A. I do not remember.

Q. You knew that in the affidavit of contest you had offered to pay the expense, did you not?

A. I do not remember but I presume so.

Q. And you knew that in order to obtain preference right you had to agree to pay the expense?

A. I think so.

Q. Is it not true that on your contest, after you had

(Page 49)

53 given your testimony and testimony in your behalf, that you were required by the official taking testimony to make a deposition to cover all expenses of the contest and you refused to do it? That will be objected to as not the best evidence, which is the record of the trial of that contest, immaterial, and because the decisions of the Secretary of the Interior says that the testimony show that these items would have been immaterial for the reason that in my proof or my contest I gave in evidence the dismissal of Rule and some other papers of his own. That point was passed on by the Secretary. It was reduced to writing by the commissioner at the taking of the testimony and that record was presented to the Local land office and the Sec'y. of the Interior and ruled upon by the Secretary and I presume by each of the inferior officials I said that I had produced the best evidence which was the testimony of Rule himself and that the only point involved was the proposition to have immediate settlement upon the land and that I did not think the testimony that Rule wanted to produce was competent or material and that I had paid for this transcript of this testimony of Rule which was the best evidence and I would not pay for any more.

Q. Do you not know that you are required, both by me, as representing Rule, and by the Commissioner to make a deposition to pay the expense of the testimony?

A. I do not remember that the commission required it from me. I know that counsel for Rule demanded it and I made the statement, which I have just now made, and refused to pay for any more.

Q. Did you refuse to pay for Rule's testimony, each and every part of it.

A. Rule was not sworn.

Q. I am referring now to testimony on behalf of Rule.

A. Yes sir, I did.

(Page 49.)

54 Q. Do you wish to say that the Secretary of the Interior has made any decision on the question of preference right?

A. In the decision given on July 19, 1913, and which is reported to in 42 land decisions beginning at page 64, the Secretary says: In this connection, however, it may be that Fisher's claim of preference right is challenged [simple] upon the ground that he refuses to pay for testimony as to facts that were used and were [irreverent] to the question involved in the case. There is upon the face of this record no evidence that Fisher refuses to pay for any testimony that it was not the duty of the local officers, under rule of 38, to [esclude].

Q. That is what the Secretary said when he held against Rule in your favor? A. Yes sir.

(Page 50.)

Q. You made the affidavit of contest, did you not?

A. Yes.

Q. Did you swear, among other things, that Hilan Rule never made any residence upon said tract of land and that no house was ever built upon said tract of land?

A. Yes. He lived on the land soon after he took it. It was built on the ground soon after filing entry was made.

Q. Did you not state in the affidavit sworn to that no house has ever been built upon said tract and no person lived thereon? A. Yes, sir.

Q. At the time contest was filed did you state in the affidavit that no one had ever lived on the tract?

A. I said what the affidavit is.

[b] I will put this to you in the words of the affidavit. (By Judge Crites.) Affidavit states further that no house has ever

been built upon said tract, no person ever lived upon said tract. A. I think that I did.

(Page 50.)

55 Q. There had been a house built upon that tract previous to your affidavit? A. I think so.

Q. And your son corroborated this affidavit?

A. I think so.

Q. You knew that Rule himself, the defendant here, had for a time lived on said tract?

A. Yes sir, I knew that Rule built this house and lived in it with his family about Sept., 1904 while he was building his dwelling house. I did not understand that Rule would undertake to hold two homesteads at one time.

Q. Will you tell us why you made a false statement?

A. I did not make a false statement, and I did explain to you what I thought. I did not suppose Rule would claim this was a residence.

Q. At the very time you made this affidavit of contest, is it not a fact that Rule had anywhere from thirty to fifty acres of land under cultivation?

A. That I did not know, I do not remember.

Q. In your affidavit of contest was not this statement said: The contestant prays that he may be permitted to make proof of these facts at his own expense? A. I think so.

Q. You made that statement? A. I think so.

Q. You say you do not known personally anything about the state of this land the time you made this affidavit?

A. Yes, I did know something about it.

Q. Your son John G. living some four miles of there, knew something about it? A. I think so.

Direct.

(Page 50.)

56 Q. State when the complainant attained his majority?

A. He was born December 29, 1891, and consequently became twenty-one years of age the day before that anniversary in [1913] which was while this contest was yet pending before the Secretary of the Interior, [undertermined].

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CHAS. A. JACOBY.

Q. What is your name? (By Attorney Fisher)

A. Chas. A. Jacoby.

Q. State your age, residence and business.

A. I am forty six years old, residence Harrison, Sioux County, Nebraska. Mason and carpenter.

Q. Do you know the complainant Wm. A. Fisher?
A. I do.
Q. State whether or not you did some work as a carpenter upon a house for him on this land in 1913? A. I did.
Q. Will you tell the court when this work began?
A. Work began on June 2, 1913.
Q. Who else, if anybody, worked there with you?
A. Frank O'Conner and Allen Fisher.
Q. At any other time during that season, did anybody else work there on this house?
A. Nobody else while I was there.
Q. Do you know where you men boarded and where the complainant boarded while that work was being done?
A. I do. Boarded part of the time at John Fisher's, taking dinner at Duncan's, a part of the time at this house.
Q. Will you tell the court the dimensions of this house?
A. The dimensions are twelve feet by twenty four feet, eight feet high. Porch on it twelve by seven feet, seven feet high.
Q. Of what material was it built?
A. Concrete foundation and on the outside was sheeting, lap siding shingle roof.

(Page 51.)

57 Q. State whether or not the house had been painted?
A. It had.
Q. What was the character of the chimney?
A. Made of Brick.
Q. How about doors and windows?
A. The doors were four panel, factory doors and the windows were two sash.
Q. Do you know the amount of lumber and its value that went into this building?
A. I do. The amount in lumber was $339.25.
Q. And the hardware? A. Was about $20.00.
Q. And the labor?
A. Was $162.00 or somewhere close to there.
Q. You say during a portion of this time the complainant and you men who were there working on this house, boarded in the house?
A. I never ate at the house the other parties finished the house.
Q. You do not know where they were boarding after you left? A. Only by [heresay].
Q. You do not know as a matter of fact, where they did eat? A. They told me they were eating there.
Q. When did he tell you that?

A. Along in September some time.
Q. Now how many times did you ever see him eat a meal in that house? A. None.
Q. Did you ever eat a meal in that house? A. No.
Q. How long did he and the other men eat at Duncan's?
A. Took dinner there while building the house.
Q. How many dinners did you take?
A. I did not copy a record of it. More than one however.
Q. What meals did you eat at John Fisher's?

(Page 51.)

58 A. Breakfast and supper.
Q. That is where you slept? A. Yes.
Q. When did you leave the premises?
A. I left the premises on July 6th.
Q. Then you worked there from about June 1st to July 6th? A. From June 2nd to July 6th.
Q. Were you there all that time?
A. Yes, about all that time.
Q. What do you mean by about all that time?
A. I mean on and off going to work.

(Page 52.)

Q. Did you keep a time book showing the amount of hours put in? A. I did.
Q. Have you got it with you? A. Yes.
Q. Show it to me. [Q.] Is that all your own time that you did there? A. Yes, that is all of my own time.
Q. The last day worked I see here was July 4th and 5th and the preceding day June 21st. Then there was several days you were short?
A. I do not remember; it may have been but I think I was there very nearly every day.
Q. When you commenced this building where was the lumber which had already been hauled up there? (By Attorney Fisher).
A. It was piled up at John Fisher's place.
Q. Now look at the book and say when he worked.
A. Frank O'Conner began working June 9th.

(Page 53.)

Frank O'Conner.

Q. What is your age? Your residence and your business?
A. Age 25, residence, Harrison, Nebraska, business carpenter.

Q. Are you the carpenter named Frank O'Conner concerning whom Mr. Jacoby has testified? A. Yes sir.

(Page 53.)

59 Q. During the time when you were at work on this house, where did you sleep and eat?

A. The first time I was out there, at John Fisher's place and Duncan's.

Q. Was you out there more than once? A. Yes.

Q. Working on this same house? A. Yes.

Q. At that time where did you eat and sleep?

A. In this house.

Q. When you [eat] and slept in this house while finishing it, where did the complainant, Wm. A. Fisher, eat and sleep?

A. He was with me then.

Q. Do you say now that during that time he cooked, [eat] and slept in this house? A. Yes.

By Judge Crites:

Q. What time did you come there and when did you go away? A. June 9th.

Q. When did you go away?

A. I was away from there a couple of days.

Q. When did you go the first time?

A. I could not tell the exact dates.

Q. When did you come back to go to work again?

A. Came back there on July 3rd or 4th.

Q. How long did you stay that time? A. Two days.

Q. Was that the last time you were there? A. Yes.

Q I mean to work? A. No sir.

Q. When was the last time?

(Page 53.)

60 A. Came back there on Sept. 1st.

Q. How much time did you actually spend on that house working? A. About twenty six days.

Q. How many of those days did the complainant, Wm. A. Fisher, stay in that house and eat there during that time?

A. About eighteen days.

Q. Where did he stay the other eight days?

A. He was at John Fisher's and Ed Duncan's.

Q. John Fisher was the brother was he not?

A. Yes sir, I think so.

Q. You say about the 4th of July the last days you were there, what utensils had he in the house?

A. I do not remember whether there was anything.
Q. When you were there in September what utensils were there in the house?
A. One bed, stove, cooking utensils and a board table.
Q. The table was something he had made out of boards and used temporarily there? A. It was just a rough table.
Q. Have you ever seen him there since?
A. I have never been there since, the last time I left there.

(Page 54.)

Anna Elizabeth Duncan.

Q. What is your name?
A. Anna Elizabeth Duncan.
Q. You are married? A. Yes.
Q. What is your husband's name? A. R. E. Duncan.
Q. Where do you reside? A. In Sioux County.
Q. How long have you lived in Sioux County?
A. Eight years.

(Page 54.)

61 Q. Do you know Newton Rule. A. Yes.
Q. How long have you known him?
A. Ever since I have been out here.
Q. What is the name of your father?
A. William Fisher.
Q. Is he german born? A. Yes.
Q. Where does he reside? A. At Verdigree, Nebr.
Q. Did you hear any conversation between your father, Wm. Fisher and the defendant, Newton Rule, in the Spring of 1913, concerning a proposed offer to sell by Newton Rule of improvements or relinquishment of this land?
A. I did.
Q. You may tell your recollection of what you heard said by Rule to your father and from Rule to yourself.
[—]
Q. When was this conversation?
A. Year ago last April. About the middle I think.
Q. Who was present?
A. Myself, my father and Rule.
Q. What was Rule doing there?
A. He came to see my father.
Q. At your house then the conversation [occured]? A. Yes.
Q. Was it direct to you or your father?
A. To my father.
Q. Did you take any part in it?

A. No, I do not think I did.
Q. How long did this conversation last?
A. I do not know.
Q. Did you have a clock?

(Page 54.)

62 A. Oh, yes.
Q. Then you did not take any notice of the passing of time? A. No not exactly.
Q. Do you remember what he said?
A. Not word for word.
Q. Did you make any memorandum of what was said?
A. No.
Q. What was your father trying to do?
A. He was not trying to do anything.
Q. He was not trying to buy Rule out?
A. Rule came there to see whether he would buy his relinquishment and be ready to file on the land if he lost.
Q. And your father did not want to buy?
A. He wanted to buy if he could get the land but had no use for the improvements.
Q. Rule then wanted to sell his improvements for $300.00?
A. No, sir, $1500.00.
Q. I thought you said improvements were to cost $1500.00.
A. I did not.
Q. Where was your husband at that time?
A. He was out in the field working.
Q. He did not hear any part of it?
A. Yes, I think he came in at the last of it.
Q. Are you sure now that Rule used the word relinquishment in that conversation?
A. I do not know that he did or not, but I suppose he did.
Q. We want to know whether you did or did not hear the word relinquishment used.
A. I could not say. I do not remember hearing it.
Q. Are you the wife of this gentleman who just testified, the carpenter who worked on the building?
A. I should say not.
Q. How far did you live from it?

(Page 54.)

63 A. About two miles.

(Page 55.)

Q. How long did these people board especially, young Fisher?
A. I do not know.
Q (By Attorney Fisher) Please tell all that was said by Rule and your father about the purchase of improvements.

A. He wanted a man to be ready to file on this land provided he lost and would pay him what he wanted for his improvements which was $1500.00. My father was ready to take it if he could get a chance to file on the land.

Q. What did your father say to him about his unwillingness to buy these improvements unless he could get a filing?

A. Of course he would not want the improvements unless he got the land. He said that he would file on the land and pay him back for the improvements if he got the chance to file on the land.

Q. At any time during the summer months of 1913, did complainant Wm. Allen Fisher, come to your house?

A. Yes.

Q. Do you know what he was doing as he came over and as he passed by?

A. I do not know what he was doing but he was going back and forth to his place and his brother's place.

Q. Was he alone or others in company with him?

A. I think he was alone. I do not remember, he came so many times.

Q. At any time during that season have you come by this land and seen this house?

A. Yes.

Q. Was that while building or after finished?

A. After finished.

Q. When was the first time then that you saw the house that summer?

A. I think it was in about October.

Q. And between that time and June did you frequently see the complainant at your place and passing to and fro?

A. I was not at home in June.

Q. When did you return to your home?

(Page 55.)

64 A. In July.

Q. Between the time you returned home and October, you saw this house. Did the complainant frequently come to your house and frequently pass by?

A. Yes.

Q. When he has been at your house has there [—] conversation between him and you or between your husband and him concerning the building of a house?

A. I think so.

Q. What, if anything, did you hear him say to yourself and husband or to any one else in your hearing, about his living up at his house?

A. I have heard him say that was his home.

Q. (By Judge Crites) Where was young Fisher coming from when he came to your house on these different [occassions]?

A. I suppose he was coming from his home, he came from that direction. Sometimes he came with his brother from his brother's place to his home.

Q. About how much of the time did he come from his brother's and how much from his own?

A. I do not know. I saw him come quite a few times.

Q. How many times did you see him come from his own place?

A. I think every time he passed by it was from his place.

Q. How many times was that?

A. I do not know just exactly; quite a good many times.

Q. Half a dozen times?

A. I do not know.

Q. Have you not some idea. Tell us how many times you saw him coming from John's place?

A. I do not know.

Q. Was it more than half a dozen times?

A. I do not know that either.

(Page 55.)

65 Q. Then you only know that you saw him come some times from one place and some times from an other?

A. Yes, He would pass by our place going from one place to the other.

(Page 56.)

Q. But are you not able to form any idea as to how frequently he came from one place and then the other?

A. Quite a few times.

Q. Quite a few times, what do you mean by that? [Q.] What do you [mena] by quite a few times?

A. Quite a number of times.

Q. Do you mean by that one time or six times?

A. More than one time.

I did not hear Rule offer to sell the relinquishment of this land he offered to sell if he lost out and wanted $1500. for the improvements.

Testimony of FRANK CONVERSE.

Q. State your age and residence?

A. Harrison Nebr. twenty six years old.

Q. In the summer 1913 you were acquainted with the complainant Wm. A. Fisher? A. Yes.

Q. Have you been there? A. I have.
Q. You may tell the court whether or not at any time you have staid there or worked there with the complainant.
A. I worked there some and slept there one night.
Q. The meals you eat there was prepared there?
A. Yes.
Q. When was the first time that you remember that you [eat]any meals at this house which were prepared by the complainant?
A. It was in about the first of September?
Q. Tell what there was by way of furniture in the house.
A. Stove, table.

(Page 56.)

66 Q. What sort of a table (by Judge Crites).
A. Poor table. Dishes benches to set on.
Q. What did you sleep in?
A. There was a bed there also bedding.
Q. When was the first time that you were there?
A. About the first of September.
Q. That was the very first time? A. Yes.
Q. When was the first time you were on the premises to work?
A. The first time was on Saturday, about the first of September, and the following Monday I worked there.
Q. How long did you work there?
A. I worked there that day.
Q. Then that was the only work you did there?
A. No, I worked another time.
Q. When was that? A. A few days after.
Q. That was all you worked there? A. Yes.
Q. Did you stay there any time you were not at work?
A. Yes, the Saturday before this Monday I went to work, I staid there.
Q. That was the only time you stayed there when not at work? A. Yes.

WILLIAM ALLEN FISHER.

(Page 57.)

Complainant sworn in.

Q. When was the first time you cooked or [eat] or slept in this house on this land?
A. About the sixth or seventh of July.
Q. That was when O'Conner was there working?
A. I think O'Conner and John had gone to town.

Q. You may tell the court how frequently after that you cooked, [eat] or slept in this house during that time and the first of Sept.?

(Page 57.)

67 A. I could not swear definitely, but I was there frequently.

Q. When was the first furniture put by you into this house?

A. This furniture we were using at this time was temporary. I had some furniture that I had got from Mr. Wertz which I have not moved over there. I got some from my brother John and some we had made.

Q. What furniture has been put in this house at any time from the time it was enclosed?

A. There was a couch, bed, writing desk, some chairs, a cook stove, cupboard, table, a washstand, and some other minor things, cooking utensils.

Q. Were those that you now enumerated some you made or which you moved there? A. Those were some I moved there.

Q. What was there by way of bed clothing and food?

A. There was enough there for anybody to eat?

Q. What was it?

A. We had canned goods, ham, bacon, tomatoes, beans, some kind of jelley, condensed milk, sugar, and other stuff.

Q. Did you ever eat any bread?

A. When we could borrow some.

Q. What about bed clothing.

A. We had some bed clothing on the single cot, a mattress and some blankets and [conforters] on the bed, and pillows.

Q. I show you the paper marked one and ask you to state where and how you came by it, if you have had it before.

A. I wrote this gentleman here one time when I was down here and this is the answer I received to the letter.

Q. Did you receive it through the mail?

A. I cannot recollect whether I received it through the mail or received it through your office or handed to me.

(Page 57.)

68 Q. But it was in answer to a letter which you wrote to the Commissioner at Washington? A. Yes.

Q. The letter which you wrote to Washington how was it sent? A. By U. S. mail.

By Judge Crites:

Q. You do not know whether you got it from the Post Office or from your father? A. I do not recollect.

Q. When was it that your furniture and bedding, etc., that you have spoken about, placed in the house, that has been put in since the furniture was bought during the time this house was under construction?

A. It was not moved in until after the house was built. Part of it was moved in this summer, in 1914.

Q. When was the rest of it moved in?

A. Some taken over before.

Q. When was it taken over?

A. I think during September, 1913.

Q. Can you tell us what date in 1914 you took the stuff over? A. No, I could not give you exact date.

Q. You said it was taken over in 1914. A. Yes.

Q. After August 1914, was it not?

A. I do not remember the date exactly, whether it was after or not.

Q. When did you first make up your mind to take this land or try to get it? A. As soon as it was open to entry.

Q. Who suggested it to you?

A. I think I heard the report of the case when it was going on.

Q. Did your father suggest it to you?

A. I think I had spoken to him before that I would like to have a piece of land.

(Page 57.)

69 Q. Did he suggest to you that you had better try to take it; did he not prepare all your papers for you?

A. I do not believe he was the first to make the suggestion but he drew up the papers.

(Page 58.)

Q. Who do you think made the suggestion?

A. I think I did myself.

Def. Exhibit 100.

Step over and look and see whether that is [—] photograph of your signature.

A. It is.

Def. Exhibit 101.

Q. Look and see whether this is a photograph of your signature? A. It is.

Q. When you started to build this house you have spoken of, there was another building on the premises, was there not? A. There was.

Q. Did you become acquainted with these premises when you first went out there?

A. I had been through that country several times before.

Q. How frequently afterwards up to the time you began to build the house, had you been on the premises?

A. I rode from here to my fathers place and several different places and we [use] to go through this land I should judge a dozen times.

Q. During that period there was some buildings on the premises, was there not?

A. There was this house that has been mentioned, upon there. Rule resides on the other side of the road.

Q. After you got your stuff in the house, did you stay there all the time?

A. Up until Thanksgiving I was there off and on.

Q. I asked you whether you stayed there all the time?

A. I used to go over to my brother's and to town.

(Page 58)

70 Q. Is it not true that you stayed at your brother's as frequently as you did at your own place?

A. I think not.

Q. What porportion of the time at each?

A. I stayed in my own residence more than at my brother's.

Q. How much more? A. I could not say.

Q. Then you have no idea actually whether you did stay there more or not?

A. I always made it a point when up there to sleep on my place.

Q. When you did not sleep there you slept at your brother's? A. Yes.

Q. When not there you came to Chadron and stayed?

A. I was around the country. I never thought it necessary to stay there continually.

Q. You knew at the time that you did not have an entry?

A. No sir, I did not.

Q. Did not any one ever tell you that you had no entry?

A. I had never been notified and thought I had.

Q. You knew your application had been suspended?

A. I did not.

Q. When did you first hear of it?

A. When Rule told me.

Q. That was when he ordered you off? A. Yes.

Q. Did you go? A. No.

Q. What were you doing when he ordered you off?

A. I think Mr. O'Conner and myself were riding on horseback crossing the place when we met him.

Q. What else were you doing?
A. That was all to my knowledge. He had some cattle on there and I told him I thought he had better move them. We talked a while and he ordered me off and I refused to go.

(Page 58)

71 Q. From whom did you obtain the material that you used in this house you built?

Attorney Fisher: I offer complainants [—] 5 and which has been furnished by [council] for the defendant, Newton Rule, in this case and which is a true carbon copy of the original petition in Ejectment which was filed in District Court for Sioux County about Sept. 14, 1914, relative to this tract of land.

(Testimony for Defendant.)

(Page 59.)

Defendant N. RULE sworn.

Q. Look at this paper marked Defendant Exhibit 103. How did you receive that?
A. I think I received it through Samuel Herrick, my attorney.
Q. Who was Sam Herrick?
A. He was my attorney at Washington. I now offer in evidence Defendant Exhibit 103, the same being a telegram signed by Asst. Jones, to A. G. Fisher dated March 3, 1914, at New Castle, Wyo.
Q. Mr. Rule have you a patent issued to the land in controversy? A. I have.
Q. Will you produce it. I now offer in evidence the patent to the land in controversy.
Q. Who was Hilan N. Rule? A. My son.
Q. Where was he born? A. In Boone County, Iowa.
Q. When was he born there? A. March 17, 1881.
Q. When did he take the original homestead entry to the land involved in the controversy? A. June 28, 1904.
Q. Is Hilan Rule living? A. No sir.
Q. When did he die? A. July 29, 1904.

(Page 59)

72 Q. You stated a minute ago that you were his father?
A. Yes.
Q. Was he a married man? A. No.

Q. Where were you born?
A. I was born in Boone County Iowa.
Q. Where did he die?
A. He died at Harrison, Sioux County, Nebraska.
Q. How long had he been in Nebraska before he died?
A. I think he came to Nebraska about the 20th of April 1904. I amnot sure but close to that time.
Q. You say he died July 29th 1904. Where did you live at the time of his death? A. At Harrison, Nebraska.

I now offer in evidence the original patent, together with the certificate of record endorsed thereon from the office of County Clerk of that County. No. 104.

I now offer in evidence certified copy of the orders of the Department of the Interior dated Feb. 7th 1914, in relation to this No. 105.

I now offer in evidence defendant exhibit #106, the same being certified copy of an order entered April 4, 1914.

I now offer in evidence a copy of the record in the case of U. S. ex rel. Newton Rule against Franklin K. Lane, secretary of the interior. Defendant Exhibit No. 107.

I now offer in evidence defendants exhibit 108, the same being a duly certified [—] and transcript of the county court of Dawes in the matter of adoption of Chas. A. Fisher, a minor child, by Wm. A. Fisher.

Q. During the time after your son's death you may state what improvements and cultivation and use of this land you made?
A. I built a house and a barn stable and put on about five and a half miles of fence.

(Page 59.)

73 Q. State very briefly what you have done.
A. I broke out forty acres of the land and cultivated it and put up some fence.
Q. How many years?
A. 1905 to 1912. I farmed it in 1912 but 1913 I did not. It was under litigation and I was called away to Washington.

(Page 60.)

Q. What was on it in the way of improvements when you went to Washington in 1913?
A. There was a house, a barn, five and a half miles of fence, forty acres of cultivated land, chicken house, pig pen, corrals, and a cistern but it was not completed.

Q. What had you used this land for besides the cultivated land? A. I used it for grazing.

Q. Was that what the most of it was best fitted for?

A. Yes.

Q. You are a farmer by occupation are you?

A. Farming and stock raising?

Q. How long have you been engaged in that business?

A. About thirty five years, I should think.

Q. Now you may state if you know or [—] capable of telling, what a fair value of the improvements would be at the time you made your final proof?

A. About fifteen hundred dollars.

Q. Did you yourself ever live or make your residence on the land? A. I did.

Q. When and for how long?

[—] In September 1904 some time. Sept. 12th 1904 until Dec. 19, 1904.

Q. That was the year your son died? A. Yes.

Q. You may tell the court why you ceased to reside upon it? A. I had to reside upon my own homestead.

Q. Are you acquainted with the house on the land testified to by the complainant? A. Yes.

(Page 60.)

74 Q. Describe it in a general way?

A. It is a frame building, the main part is twelve by twenty four and eight feet high, and an addition built on the west side twelve by fourteen, with a porch on the south and west side. I did not measure the porch. I do not think it is painted, I think it has been stained by oil.

Q. What is it worth or what was it worth at that time?

A. I think about $350.00 or $400.00.

By Attorney Fisher:

Q. The building would be worth all it would be worth to haul the material and cost of work, lumber?

A. I do not know whether it would or not: I do not think it would, but I do not know what the amount was that they have testified to.

Q. In September 1904 you moved off this land, did you not? A. I did on December 19th, 1904.

Q. You could not hold down by residence the two homesteads, could you? [—]

Q. And you continued to live on your own homestead from that time until you made final proof on your own home in August 1914 [on] 1910 the same date that you made final proof on the son's homestead, is that not a fact? A. It is.

Q. At any time in the year 1913 did you remove any of the improvements from this homestead of your son?
A. I did, I moved a water tank and some pipe that led to the water tank from the well but no other improvements were moved from the place.
Q. Do you remember when that was?
A. It was about the time that I got notice from the land office that I had lost out on the rehearing.

(Page 60.)

75 Q. Did you not also remove one of the buildings or a part thereof that was on that land?
A. I moved some lumber out of the barn but no building.

I offer in evidence certified transcript of the application of Wm. A. Fisher for leave to enter this claim in question. Exh. 109. I now offer in evidence certified copy of the order suspending the entry. Def. Exhibit 110.

(Page 61.)

76 (Stipulation as to Defendant's Exhibit 103, Telegram of A. G. Fisher to Jones, Assistant Secretary of Interior, and Reply thereto.)

It is stipulated, by the parties hereto

That defendant offered in evidence an exhibit which was marked #103 by stenographer and which cannot be found.

That said exhibit was an authentication by Commissioner of General Land Office of portion of record in D.20105, which was Contest of Allen G. Fisher vs. heirs of Hilan N. Rule and that this Exhibit consisted of a telegram dated New Castle, Wyo. March 2nd, 1914, directed to Hon. A. A. Jones, Assistant Secretary of Interior Department at Washington, D. C. and asked that said Allen G. Fisher be granted ten days wherein to show cause to said Department, against the dismissal of his said contest and the passing to patent of said proof of heirs of Hilan N. Rule and that the remainder of said exhibit consisted of a telegram dated Washington D. C. March 3rd, 1914, addressed to Allen G. Fisher Newcastle Wyo. and signed by said assistant Sec. Jones and therein said Allen G. Fisher was advised that he was allowed ten days wherein to make said showing to the said Secretary. It is further stipulated that pursuant to said notice and leave said Allen

G. Fisher, did on March 13th, 1914 file his said showing in said department and cause, but the same was overruled on consideration.

This stipulation may be included in the certificate of evidence by the trial judge.

ALLEN G. FISHER,
Solicitor for complainant.

ALBERT W. CRITES,
Solicitor for defendant, Rule.

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77 Contest Notice,

Department of the Interior,
United States Land Office.

C#7881 Alliance, Nebr.,
O11827 June 24th, 1910.

A sufficient contest affidavit having been filed in this office by Allen G. Fisher, contestant, against homestead entry No. 6851 made June 28th, 1904 for Section 23, NE ¼ Sec. 22 & N½ & SW¼ Township 30 N, Range 55 W, by Hilan N. Rule Contestee, in which it is alleged the said Hilan N. Rule never made any settlement on said tract of land; said Hilan N. Rule never established any residence upon said tract of land; that no house was ever built upon said tract of land; and no person ever lived on said tract; that said Hilan N. Rule died leaving him surviving Newton Rule, Sarah Rule, Samuel J. Rule, Jackson Rule and Susie Rule, his heirs; that none of the said heirs have remedied said defect down to the present time; that said failure to remedy said defects is caused by the laches of the entrymen and his heirs and not through enlistment or service in the naval, military or marine corps service of the United States during any war or Philippine insurrection said parties are hereby notified to appear, respond and offer evidence touching said allegation at 10 o'clock a. m. on August 12th, 1910, before Hon. A. L. Schnurr, county judge at Harrison, Nebraska and on August 19th, 1910, final hearing will be had before the register and Receiver at the United States Land Office in Alliance, Nebr.

W. W. WOOD,
Register.

.....
Receiver.

(Affidavit of Contest.)

Received
Jun. 28, 1910 A. M.
United States Land
Office
Alliance, Nebraska.

C3881 462168-2 a

Department of the Interior
Serial No. 011827.
United States Land Office.

Alliance, Nebr.,
C 7881 June 18, 1910.

June 23rd, 1910, before the undersigned clerk of the district court in and for Sioux County, Nebraska, personally appeared Allen G. Fisher of Chadron, Nebraska, who being first duly sworn according to law on oath states that he is acquainted with homestead entry No. 6851 for the northeast quarter of section 22 and the north half and the southwest quarter of section 23 all in township 30 north of range 55 west in Sioux County, Nebraska which was made by Hilan N. Rule on June 28th, 1904, and knows the present condition of said tract of land. That the said Hilan N. Rule never made any settlement of said tract of land; that the said Hilan N. Rule never established a residence upon said tract of land. That the said Hilan N. Rule never established a residence upon said tract of land. That the said Hilan N. Rule died, leaving him surviving as his heirs at law his father, Newton Rule; his mother, Sarah Rule; his brothers Samuel J. Rule and Jackson Rule; and his sister, Susie R. Rule as this affiant

(Page 63.)

is reliably informed and believes. Affiant states further that no house has ever been built on said tract, and no person ever lived on said tract.

Affiant states further that none of the said heirs at law have remedied the said defect down to the present time and there has never been a settlement made upon said tract of land and there has never been a residence established upon said tract of land by any person down to the filing of this contest.

Affiant states further that the failure to remedy said defects is caused by the laches of said entryman and his heirs at law and not through any enlistment or service in the naval or military or marine corps of the said United States nor the Philippine insurrection.

The contestant prays that he may be permitted to make proof of these facts at his own expense and that said homestead entry #6851 may be cancelled. He asks that the testimony of the witnesses may be taken before A. L. Schnurr, probate Judge, at Harrison, Nebraska.

ALLEN G. FISHER.

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78 * * * * * * *

(Page 64.)

79 Homestead Entry.

U. S. Land Office Alliance, Nebraska No. 04483

Final Proof. Receipt No...

Testimony of Claimant.

Question 1. What is your full name, age, and post-office address?

Answer. My correct [nem] is Newton Rule, my age fifty-two years and my post-office address is Andrews, Nebraska.

Question 2. Are you a native born citizen of the United States and if so, in what State or Territory were you born? (If foreign born, see note 1.)

Answer. I am a native born citizen of the United States born in Iowa.

Question 3. Are you the same person who made homestead entry No. 6859 (014483) at the Alliance, Nebraska Land Office on the [Twenty-eight] day of June, 1904 for the SW¼ Sec. 25 and South half and NW¼, Section 26, Township 30 North, Range 55 West of the Sixth Principal Meridian.

Answer. I am the identical person who made this entry.

Question 4. (a) Are you married or single?

Answer. I am married.

(b) If married, whom does your family consist?

Answer. My family consists of wife and two children at home other children doing for themselves.

(c) If a married woman, state whether your husband now has an unperfected homestead entry, and during what time he has resided upon this land with you. Also state his citizenship qualifications. (See note 1 at bottom of third page.)

Answer. [—]

Question 5. (a) When did you first establish actual residence on this land?
Answer. I established actual residence on this land December 19, 1904.

(b) When was your house built on this land?
Answer. I commenced building in November, completed before moving in.

(c) Have either you or your family ever been absent from the homestead since establishing residence?
Answer. I was absent.

(d) If there has been such absence, give the dates covered by each absence; and as to each absence, state whether you, your family or both, were thus absent and the reason for each such absence.
Answer. In February, 1907 I was absent on business for two weeks. In April, 1907 was again absent two weeks, and in September, 1907 about two weeks. In March, 1909 about two weeks. The family remained on the land during these absences. That is all my absence.

Question 6. Describe the land embraced in above entry by legal sub-divisions, showing fully the character of same, and kind and amount of timber, if any.
Answer. There is about 100 acres of the whole tract cultivable. The land is rough and rolling. There is no timber on this land.

By Subdivisions.

Question 7. State the number of acres cultivated kind of crop planted and amount harvested each year. If used for grazing only, state number and kind of stock grazed each year and by whom owned, and compensation, if any received. How many acres of the claim are now cleared or broken and under cultivation. (See note 2, page 3.)
Answer. I have broken and cultivated twenty-five acres of the tract for six seasons. The land is enclosed with fence and I have used the land at all times for grazing my own stock. I have kept say as an average about seventy-five head of cattle there.

Question 8. Describe fully and in detail the amount and kind of improvements on each subdivision. State total value of improvements on the claim.
Answer.

Subdivision Character of improvements.

The house is located on NE¼, NW¼ Sec. 26 I have a frame house 16x24 ft. story and half, with addition 12x16 ft. and buttery 7x8 ft. Value of house $750.00. Well, windmill $325.00, 2 and ¾ mile of wire fence of 3 wire fence $220.00. Cave 8x10 ft. $200.00. Outhouse $10.00, Smokehouse, $10.00. Breaking $100.00.

Question. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Answer. It is not within an incorporated town or site of a city or town or used for business.

Question 10. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

Answer. There are no indications of coal salines or minerals, on this land.

Question 11. Have you ever made any other homestead entry? If so, describe the same.

Answer. I never made any other homestead entry.

(Page 65.)

80 Question 12. Have you sold, conveyed, or agreed to sell or convey any portion of the land; if so, to whom and for what purpose?

Answer. I have not sold conveyed or agreed to sell or convey this land or any portion of it.

Question 13. Have you optioned, mortgaged, or agreed to option or mortgage, or convey this land, or any part thereof; if so, when, to whom, and for what purpose and in what amount?

Answer. I have not optioned mortgaged or agreed to option or mortgage this land or any portion of it.

Question 14. Have you any personal property of any kind elsewhere than on this claim? If so, describe the same, and state where the same is kept.

Answer. I have no personal property elsewhere except three cows at my son's place.

Question 15. Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral) made by you since August 30, 1890. If

relinquished, state what consideration, if any, was received therefor.

Answer. I made no other entry or filing for public land.

NEWTON RULE.

I Hereby Certify that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that [dependent] is to me [is] personally known (or has been satisfactorily identified before me by—that I verily believe [dependent] to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office, in Alliance, Nebr. within the Alliance, Nebraska land district, this fifteenth day of August 1910.

W. W. WOOD,
Register.

Final Affidavit required of Homestead Claimants.

I, Newton Rule having made homestead entry of the SW¼ Sec. 25 and South Half and NW¼, ... Section 26 .... Township 30 North, Range 55 West of Sixth Principal Meridian subject to entry at Alliance, Nebraska, under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of Section No. .... of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a native born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the 19th day of December 1904 to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole bona fide owner as an actual settler; that I will bear true [allegance] to the Goverment of the United States; and further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States, except .....

NEWTON RULE.

I Hereby Certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto that affiant is to me personally known (or has been satisfactorily identified before me by ..... that I verily believe affiant to be a credible person and the identical per-

son hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in *** Alliance, Nebraska this Fifteenth day of August 1910.

W. W. WOOD,
Register.

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81 (Contest Proof, Testimony of E. F. Pontius.)

(Page 66.)

Department of the Interior.
United States Land Office, Alliance, Nebraska.

Allen G. Fisher,
vs.
Newton Rule, Heir of Hilan N. Rule Deceased.

Involving the NE¼ Sec. 22 N½ and SW¼ Sec. 23, Twp. 30, Rng. 55W.

It is stipulated between the parties that in lieu of the lost stipulation setting the taking of testimony to begin on this day November 2, 1910, at 10 o'clock A. M. that the cause may now begun at the hour stated, to-wit, November 2nd, 1910 at 10 o'clock A. M. and that the taking of testimony shall proceed at this time, and the final hearing at the land office at Alliance, shall be November 16, 1910.

ALLEN G. FISHER,
NEWTON RULE,
Contestee.

Allen G. Fisher appearing in person and by A. M. Morrisey, his Atty. and Newton Rule, appearing in person.

E. F. Pontius, of lawful age being first duly sworn on oath deposes and says:

By Mr. Fisher:

Mr. Fisher: The contestant offers in evidence Exhibit A an authenticated copy of the testimony of Newton Rule and his witnesses upon the final proof of the entry attacked.

Mr. Crites: Contestee objects as incompetent, irrelevant and immaterial and no sufficient foundation laid, not a proper method of proving any of the facts involved in this contest, the Receiver of the Alliance Land Office, is not authorized by any law of the United States to make copies of any paper or proofs either in the General Land Office or any office of the Register or Receiver.

Mr. Fisher: The contestant offers in evidence an authenticate made by the Commissioner of the General Land Office of the testimony given by Newton Rule, before the Register and Receiver at the United States—at Alliance, Nebraska, on August 14, 1910, upon the homestead entry of Newton Rule himself, and asks the Register and Receiver and the Commissioner of the General Land Office to take notice of [there] records in relation to homestead entry No. 6850, made June 28th, 1904, at Alliance, Nebraska, Land Office for lands in Section 23 Twp. 30 Rng. 55.

Mr. Crites: Let me see the record you are offering in evidence.

Mr. Fisher: I paid for this copy by a remittance Sept. 23, 1910 the receipt of which was acknowledged by the Commissioner of the General Land Office in a letter dated October 20, 1910, but I have not yet received the authentication.

Mr. Crites: Contestee objects to this office as incompetent irrelevant and immaterial, no sufficient foundation laid, not a proper method to prove the facts involved in this contest said supposed record has not been exhibited to contestee or his counsel and we have had no opportunity to examine the same.

E. F. Pontius, of lawful age being first duly sworn testified as follows:

By Mr. Fisher:

Q. State your name, residence and official position.

A. E. F. Pontius, County Clerk, Harrison, Nebraska.

Q. State if you held this position and were [ex-offico] Clerk of the District Court for said County on January 8th, 1909?

A. Yes sir.

Q. On this date did Newton Rule appear before you as witness and testify on behalf of the Government in contest case No. 5261, Serial 01896, concerning the homestead entry #6933 of Joseph H. Forbes? A. Yes, sir.

(Page 67.)

82 Q. You may state whether or not he was sworn by you to testify the truth in that case? A. Yes sir.

Q. Was he also produced and sworn as a witness upon the trial of the United States contest begun Jan. 5, 1909, No. 5265 against homestead entry No. 9493, of Nels Engebretsen, Serial No. 01840? A. Yes sir.

The contestant offers in evidence and asks the Honorable Register and Receiver and the Commissioner of the General

Land Office, to take judicial notice of their letter and decision dated April 2, 1910, by Frank Pier, First Ass't Sec'y in the last named contest Alliance 01840.

Mr Crites: Will you let me see the record and decision that you are now offering.

Mr. Fisher: The Register and Receiver can produce them.

Mr. Crites: I desire to inspect this supposed record for the purpose of entering and recording the proper objection thereto. Will you produce it for that purpose.

Mr. Fisher: This record can be produced at the Land Office and examined by you at the final hearing November 16, 1910.

Q. Did you preserve the testimony which was given by him in this [cas-] Serial 01896? A. Yes sir.

Q. In the record of his testimony in that case at page 34 was he asked this question and did he give these answers?

"Q. Was your deceased son Hilan N. Rule, ever in Sioux County, Nebraska, before he made his homestead application at Alliance Land Office on June 28, 1904? A. Yes sir.

Q. When?

A. He came in Sioux County on the [morni-g] of the 24th day of June 1904, I believe.

Q. To where in Sioux County did he come and when did he leave for the land office?

A. He came in on the passenger train on the morning of the twenty fourth of June, if I have the dates exact, which I believe I have. My two sons came together.

Q. The question was; When did he leave for the Land Office?

A. I do not know but I believe on the same day, while I can't say. I will explain further; after getting off the train I ordered breakfast at the Harrison House for the two boys while I went to the livery stable and got a team; and we drove out and examined these present homestead entries and returned in the evening, and I believe we took the first train to Alliance Land Office, passenger train, which I think was something like seven o'clock in the evening.

Q. What was the date of this son's death?

A. I believe the twenty ninth of July 1904.

(Page 68.)

[A.] The questions and answers are in the record that I have in my possession with the exception that the name of the deceased entryman is Hilan M. Rule.

Cross-Examined

By Mr. Crites:

Q. *What roll is that you had in your hands while answering this last question?

A. This is the record of the testimony in the case of United States vs. Joseph H. Forbes.

Q. Is that the original testimony in the case or is it a copy retained by you?

A. This is a carbon copy made at the same time the original was.

Q. Did you make the copy yourself?

A. The original and copy were made by a shorthand writer and stenographer who was employed to take the
83 testimony.

(Page 68.)

Q. Then you yourself made neither the original or the copy which you have in your hand?

A. No sir I did not. I employed a shorthand writer and stenographer.

Q. Who was this stenographer you employed?

A. C. O. Wertz.

Q. You didn't yourself make his notes of the testimony?

A. No.

Q. And you didn't read his notes of the testimony?

A. I can't read shorthand.

Q. Was this copy made in your presence?

A. It was made partly in my office and partly in the court room.

Q. Was this carbon copy that you hold in your hand made in your actual presence?

A. I couldn't say that it was.

Q. Did you with said Stenographer compare this copy which you hold in your hand with his stenographic notes?

A. No I did not.

Q. How many sheets of typewriting are there in this roll which you hold in your hand?

A. Two hundred and two pages.

Q. Now Mr. Pontius is it not true that independently of this roll you have no actual personal recollection of what Mr. Rule did swear to on that occasion?

A. I have no personal recollection to the exactness of it but heard the most of the testimony.

Q. Can you say from recollection that you heard this particular part concerning which Capt. Fisher has just interrogated you?

A. I heard the questions asked and as near as I remember the answers were the same as in the records.

Q. Can you say from personal recollection that you heard these same questions asked and the answers returned?

A. That is my recollection of the testimony.

Q. It is not true that you are relying upon this transcript that you hold in your hand rather than upon your actual recollection of the questions and answers?

A. Well, let's see, I remember the sum and substance of the questions, although I do not remember the dates that he named.

Mr. Fisher: Before the ruling, I offer in evidence the certificates of the witness Clerk of the Court and of the stenographer attached to this record in the following words:

(Page 69.)

State of Nebraska,
Sioux County—ss.

I, E. F. Pontius Clerk of the District Court in and for Sioux County, Nebraska, duly qualified and acting hereby certify that the within transcript was made from the notes of the stenographer C. O. Wertz and by him certified to be a true copy of said notes, wherein the United States is Plaintiff and Joseph H. Forbes, also of Sioux County is defendant and that J. M. Wilson, L. C. Pullen, Newton Rule,—A. J. Bogart and P. R. Wadsworth, witnesses for the plaintiff, and J. W. Forbes, J. D. Haywood, Wm. Cooper, A. F. Trowbridge, P. R. Francis, C. A. Minnick, T. F. Allen, F. L. Staley, H. Metzger, Carl Madsen, J. F. Barnum, J. J. Hecker, J. F. Young, C. Nelson, Walter Forbes, Ray McCormick, Mrs. R. Forbes, R. Pettit, Nels Engebretson, and Jos. H. Forbes, defendant's witnesses were duly sworn by me before testifying and that all of said witnesses were not required to sign their respective testimony for the reason that the stenographers notes could not be transcribed in time to do so and agreed to by stipulation between special agent P. R. Wadsworth, and the defendant.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at Harrison, Nebraska, this 3rd day of February A. D. 1909.

(Seal)

E. F. PONTIUS,
Clerk of District Court.

(Page 69.)

84 State of Nebraska,
Sioux County.

I, Cyrus O. Wertz, hereby certify that the within transcript is a true and correct carbon copy of the original transcript of shorthand notes taken by me, wherein the United States is plaintiff and Joseph H. Forbes, also of Sioux County is defendant.

CYRUS O. WERTZ,
Reporter.

Subscribed and sworn to before me this 3rd day of Feb. 1909.

E. F. PONTIUS,
Clerk District Court.

Department of the Interior
United States Land Office
Alliance, Nebraska.
May 5th, 1915.

I hereby certify that the foregoing is a true and correct copy of the testimony of E. F. Pontius taken before the County Judge of Sioux County, Nebraska on November 2nd, 1910, and also of the final proof testimony and final homestead affidavit of Newton Rule on Homestead No. 04483, as the same appears in the record in the contest proceedings and other proceedings involving the Homestead No. 011827 of the Heirs of Hilan N. Rule, deceased for NE¼ Section 22, and North Half and SW¼ of Section 23 in Township 30 North of Range 55 West of the 6th P. M., said record being at this time in my official custody.

(Revenue Stamp)

W. W. WOOD, Register,
H. J. ELLIS, Receiver.

(Page 63.)

101 C. 7881. 462168-4 a Serial No. 011827.

Department of the Interior,
United States Land Office.
Alliance Nebraska, February 20, 1911.

Allen G. Fisher,
vs.
Newton Rule, heir of Highlan N. Rule, Deceased.

Involving NE.¼ Sec. 22, N.½ and SW.¼ Sec. 23, T. 30 N., R. 55 W.

Decision of Register and Receiver.

Highlan N. Rule made H. E. No. 6851 for the land described on June 28, 1904.

June 28, 1910, Allen G. Fisher filed a contest against said entry alleging that there had never been any settlement on said land; that no person had ever lived on the said; that Highlan Rule died and since his death his heirs have not remedied the defects to the time of filing the contest.

On the 15th day of August, 1910 Newton Rule, one of the heirs of Highlan N. Rule, deceased, offered final proof on

(Page 70.)

said homestead entry, and on August 8th, 1910, said Allen G. Fisher filed a protest against said final proof, making substantially the same allegations contained in the contest.

Hearing was ordered by this office on the protest and contest affidavit for August 19, 1910, at 10 A. M. at this office, the testimony to be taken before A. L. Schnurr, County Judge, at Hanson, Nebraska, on August 12, 1910. The case was twice continued on stipulation and finally came to final hearing at this office on November 16, 1910.

We are now of the opinion that neither the contest or protest should have been allowed, for the reason that the allegations are insufficient.

It appears by the testimony that the law has been complied with as to improvements, use and cultivation of the land, and residence on the land by the heir was not required.

We recommend the contest and protest be dismissed, the entry held intact, the proof approved and final certificate issued.

(Page 70.)

102 W. W. WOOD, Register.
H. J. ELLIS, Receiver.

Notice to
Allen G. Fisher, Chadron Nebraska,
(By registered mail)

Newton Rule, Andrews, Nebraska,
(By ordinary Mail.)

462168-6 a Alliance 011827
2 Ex. J. A.

"H" Department of the Interior.
J. W. W. General Land Office.
Washington.

D-20105

Address only the
Commissioner of the General Land Office.

September 27, 1911.

Copy.

Allen G. Fisher,
vs.
Heirs of Hilan N. Rule, Register and Receiver.

Dismissed—Affirmed.

Alliance, Nebraska.

Gentlemen:

The entry in this case, for the NE¼, Sec. 22; N½ and SE¼, Sec. 23, Tp. 30 N., R. 55 W., was made by Hilan N. Rule, a single man, on June 28, 1904. Rule died about one month after entry, and on June 18, 1910, six years afterwards, Allen G. Fisher filed contest affidavit against said entry, and after alleging the death of the entryman and naming the heirs, charged that no house was ever built on the tract; that no one ever resided thereon, and that:

Affiant states further that none of said heirs at law have remedied the said defect down to the present time, and there has never been a settlement made upon said tract of land by any person down to the filing of this contest.

Although said affidavit failed to state a cause of action against the heirs, as they are not required to make settlement

on the land", You allowed a hearing, and at said hear-

(Pages 70 & 71.)

103 ing, at which the heirs were represented by counsel, the only proof offered was to show by documentary evidence that the deceased entryman's father made a homestead entry in his own right, about the same time the entry herein

(Page 71.)

involved was made; that he made final proof in which he swore that he resided for five continuous years on his own entry, and therefore, it was not possible for him to "make settlement" on his son's entry during the same period of time.

You recommended the dismissal of the contest, and it hardly seems necessary to say that no other decision could have been rendered.

Counsel for contestant in this case is [mastaken] in his interpretation of the homestead law as affecting the heirs of the deceased entryman.

The Heirs are not required to make settlement" or to reside on the land at all. All they are required to do is to keep up the cultivation of the land for five years from date of entry, and as the land involved in this case is essentially grazing land, the use of the land for that purpose is a sufficient compliance with the law. it follows that the fact that the dedeceased entryman's father resided on his own homestead for five years, and made final proof, is utterly immaterial.

The law casts upon the widow of a deceased entryman, if there be a widow, and if not, upon his heirs generally, the right to complete the entry and earn title by cultivating the land for the required length of time.

There was no charge and no proof that the heirs failed to cultivate the land.

The contest is, therefore, dismissed, subject to appellant's right of appeal to the Department.

Copies of this decision are inclosed for service upon the parties. In due time promptly report the action taken.

Respectfully,

JOHN McPHAUL,
Acting Assistant Commissioner.

Board of Law Review,
By W. H. Lewis,
WSH:

(Page 71.)

85 Official Copy
Not To Be Taken From The Record.

Decision Promulgated

271-14

Defts. ex No. 105 Department of the Interior,

Washington.

Feb. 7, 1914.

D*20105

Allen G. Fisher,
vs,
Heirs of Hilan N. Rule.
"H".

Alliance 011827.

Showing required.

February 28, 1913, the Department on appeal found in favor of the contestant in the case of Allen G. Fisher vs. Heirs of Hilan N. Rule, involving the homestead entry of Rule, for the NE¼ Sec. 22, and N½ and SW.¼ Sec. 23, T. 30 N. R. 55 W. Alliance Nebraska land district.

July 19, 1913, a [motin] for rehearing was denied, and on November 3rd 1913, a petition for the exercise of supervisory authority was likewise denied. Prior thereto, however, and on September 2, 1913, the Department directed the local officers to allow no entry for the land involved on account of a court proceeding begun in the Supreme Court of the District of Columbia, with a view to requiring the Secretary to re-[inestate] Rule's entry. The court proceeding referred to resulted in a decision by the court holding in effect that the heirs of Rule had earned title to the land and should receive patent. Said decision was based upon the practice of this Department, which had long prevailed, that a homestead entryman was allowed six months after date of entry within which to establish residence, and that, therefore, Rule was not in default at the time of his death, about a month after

(Page 72.)

entry, without having established residence. [Futhurmore] this Department, under date of January 29, 1914, in the case of Bertram C. Noble, overruled its decision of July 19, 1913, in this case and held that it was error to revoke the long es-

tablished practice of allowing six months within which to establish residence, especially as applied retroactively to the disadvantage of persons who had acted under that rule.

In view of the above Fisher is allowed ten days from notice hereof within which to show cause, if any, why the contest should not be dismissed and the entry of Rule [reinestated] and passed to patent.

First Assistant Sec'y.

(Defendant's Exhibit 106, Decision of First Assistant Secretary of Interior dismissing Contest of Allen G. Fisher.)

Official Copy. 462168-27 a 10
Not to be Taken From
The Record
Department of the Interior,
Washington.
D-20105.

April 4, 1914.
"H"
Alliance-011827.
Former decision recalled
and vacated.

Received Apr. 10 1914, G. L. O.

Allen G. Fisher,
vs.
Heirs of Hilan N. Rule.

(Page 72)

86 Defts ex 106

February 28, 1913, the Department on appeal found in favor of the contestant in the case of Allen G. Fisher vs. Hilan N. Rule involving the homestead entry of Rule for the NE¼ of Sec 22 and N½ and SW¼ Sec. 23 T. 30 N. R. 55 W. Alliance, Nebraska, land district. July 19, 1913, the motion for rehearing was denied See 42 L. D., pages 62 and 64. November 3, 1913, a petition for the exercise of the supervisory authority of the Secretary was likewise denied.

May 17, 1913, the local officers were notified by the Commissioner of the General Land Office to suspend all action with reference to the contest or disposal of the land embraced in the said entry, because of a proceeding begun in the Supreme Court of the District of Columbia for the purpose of

requiring the Department to reinstate the entry of Rule and issue patent thereto On the same date. May 17, the local officers reported [thet] the entry was cancelled on May 6, 1913, and that notice of [preferrence] right issued to the contestant: that on May 6, the same date as the cancellation of Rule's entry, William A. Fisher, not the contestant, filed application to make homestead entry, which application was suspended by the local officers because the [applcaint] was not twenty one years of age and did not [satisfactorly] show that he was the head of a family.

The record does not show whether the contestant subsequently filed application to make entry in the exercise of his preference right, but it is alleged that he has made settlement.

The said decisions of the Department were based upon the view that where an entryman dies without having established residence upon his entry, the entry thereupon terminates and his heirs succeed to no rights whatever in the land. In this case the entryman had died within six months from the date of the entry and he had not established residence. It had been a long and well established rule in the Department that an entryman was allowed six months within which to establish residence after the date of his entry and in the case of Bertram C. Noble decided January 29, 1914, it was held that it was error to revoke this rule which had so long obtained, especially as applied retroactively to the disadvantage of persons who had acted under that rule. Accordingly the departmental decisions in the present case were overruled

(73.)

and the practice of allowing six months in which to establish residence was reaffirmed.

Under date of February 7, 1914, the Department called upon Fisher to show cause why his contest should not be dismissed and the entry of Rule reinstated and passed to patent. He has responded to that order and urges that the former action should be [adherred] to and that the court proceedings which resulted in favor of Rule should be reinstated, if possible, and carried up [an] appeal, if necessary, to sustain the action of the Department. These contentions have received consideration but the Department is fully convinced that its former action in the present case cancelling the entry of Rule was error. For the reasons stated in the case of Noble, supra, the aforesaid decisions in the present case are hereby recalled and vacated, the contest of Fisher dismissed, all

conflicting application rejected and the entry of Rule reinstated. The Commissioner will take appropriate action in the light of this decision.

A. A. JONES,
First Assistant Secretary.

(Page 74)

87 911. 462168-2 B

Department of the Interior Homestead entry.

U. S. Land Office, Alliance, Neb. Serial No. 015938

Received 12:08 P M Application. Receipt No. 1181976

May 6, [191-]

United States Land Office

Alliance Nebraska. William A. Fisher (male) a resident of Chadron Nebr. do hereby apply to enter, under section 2289, Revised Statutes of the United States, the NE¼ Sec 22 and N½ and SW¼ Sec 23 TWP 30 N, Range 55 W 6″ P. Meridian containing 640 acres within the Alliance, Neb. land district: and I do [solemly] swear that [—] am not the proprietor of more than 160 acres of land in [a] any state or territory; [thqt] I am a native born citizen of the United States, and under the age 21 years, being head of a family as am evidenced by the affidavit attached and part of this application that my post-office address is Chadron Neb. that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the [benifit] of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the [requirments] of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in [collusion] with any person, corporation, or syndicate to give them the [benifit] of the land entered, or any part thereof or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may require from the Government of the United States will inure in whole or in part to the [benifit] of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming under an entry made under any of the non-min-

eral public land laws other than the homestead laws more than 160 acres; and that I have not Heretofore made any entry under the homestead laws, or filed a soldier's or sailor's declaratory statement, except None that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knwoledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, [cinnebar], lead, tin, or copper, nor any deposit of coal, placer cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of minors or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian:

WILLIAM A. FISHER,

Note—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 125, U. S. Criminal code, over.) c 6-771

Registered application posted 10/8/14 JWN

(Page 76.)

104 Alliance 015938 462168-4 B
"C" (CMS) Report Department of the Interior.
United States Land Office.

Alliance, Nebraska.
C (Place)
January 27th, 1914.
(Date)

Hon. Commissioner,
General Land Office, Hold for word
Washington, D. C.

Sir:

Referring to your letter of January 23, 1914 calling for report as to Homestead Application to No. 015938 by William A. Fisher, I have the honor to report that under Departmental Decision of February 28, 1913, and April 17, 1913 and your letter "H" of May 2, 1913, Homestead entry No. 011827 for

the NE¼, N½ SE¼ Section 23 in Township 30 North of Range 55 West of 6th P. M. was canceled in the contest of Allen G. Fisher vs. The Heirs of Highlan N. Rule. Notice of cancellation was given contestant by registered mail on May 6th, 1913.

On May 6th, 1913, William A. Fisher filed Homestead application No. 015938 for NE¼—Section 22, North Half and SE ¼ of Section 23 in Township 30 North of Range 55 West of 6th P. M., alleging for qualifications that he was under 21 years of age, and the head of a family by reason of the adoption of a minor child. On May 14, 1913 the application was suspended for record evidence of such adoption, and such evidence was filed on May 31, 1913.

On May 17th, 1913, this office received your telegram instructing as to "Suspend action on Letter of May 2, cancelling entry of Rule Serial 011827; Report by mail present status of land".

Mr. William A. Fisher was advised of the suspension of his application by reason of your said telegram.

By our letter of May 17th, 1913 to your office a full report of the status of application No. 015938 was made and action on the application stands suspended awaiting instructions from your office in the premises.

Very respectfully,

W. W. WOOD,
Register.

(Page 77.)

88 Department of the Interior
General Land Office.
Washington January 23, 1914.

Address only the
Commissioner of the General Land Office.

Mr. William A. Fisher,
Chadron, Nebraska.

My Dear Sir:

In reply to your letter of December 26, 1913 you are advised that no application in your name appears to have been received in this office from the local land office at Alliance, Nebraska, and inasmuch as you state that you made "home-

stead Entry'' on May 6, 1913, the local officers at Alliance have been called upon by letter of even date to report in the premises. When they shall have done so, you will be further advised.

In the meantime, it might be well for you to write to them direct in regard to the matter.

Very respectfully,

C. M. BRUCE,
Assistant Commissioner.

1-6 ATB.

(Page 79.)

89 Complainants 3.

Filed January 16, 1914. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, the 16th day of January, 1914.

The U. S. ex rel Newton Rule,
No. 56351. vs. At Law.
Franklin K. Lane Sec'y of the Interior.

The Clerk of said Court will please enter the above entitled cause dismissed, without prejudice.

SAMUEL HERRICK,
Attorney for Relator.

(Page 82.)

Defendants exhibit No. 107.
In the Supreme Court of the District of Columbia.

Transcript of Record.

To all whom these presents come—Greeting:

United States of America,
District of Columbia—ss.

Be It Remembered, That in the Supreme Court of the District Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, among others, were the following proceedings, to-wit:

Petition for Mandamus.

Filed November 11, 1913, J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

The United States on the relation of Newton Rule,
No. 56351. vs. At Law.
Franklin K. Lane, Secretary of the Interior.

To the Supreme Court to the District of Columbia:

I. The petition of Newton Rule respectfully states: That petitioner is a resident of Sioux County, State of Nebraska and a citizen of the United States of America.

II. That on the 28th day of June, 1904, Hilan N. Rule, the son of the petitioner, made at the United States Land Office at Alliance, Nebraska, homestead entry under sections 2289 to 2297, inclusively of the U. S. Revised Statutes, for the N.E.¼ of Section 22 also the N.½ and the S.W.¼ of Sec. 23, Twp. 30 N. Range 55 West 6th Principal Meridian, State of Nebraska.

(Page 82.)

90 III. That immediately after making said homestead entry the said Highlan N. Rule commenced preparations to remove upon and to commence residence upon the said tract of land.

But in the midst of these preparations, and while actually engaged in journeying to the land with his household goods, the said Highlan N. Rule became ill and died on July 29, 1904.

(Page 83.)

IV. That on September 12, 1904, your petitioner, together with his family, removed upon the said tract of land and lived thereon until December 19, 1904.

V. That during the years 1905, 1906, 1907, 1908, 1909 and 1910, your petitioner, as heir of the said Hilan N. Rule, cultivated a portion of the said tract of land, the amount cultivated being increased each year until in the year 1910, it amounted to forty acres; that your petitioner also used it for the grazing of stock; that he improved it with a house, barn, fencing, out-houses, corrals and other improvements at an expense of more than $1500.00; and that on August 15, 1910, petitioner submitted final proof on said entry under the provisions of the said revised Statutes of the United States.

VI. That on June 28, 1910, one Allen G. Fisher filed contest against the said homestead entry upon the allegations that the entryman had died without establishing residence and that settlement upon the land had not been made by any person.

VII. That upon the hearing ordered and held upon the said contest affidavit said Allen G. Fisher refused to pay the fees of certain witnesses offered by the said Newton Rule in the defense of the entry, and accordingly the testimony of such witnesses was not taken.

VIII. That as a result of the hearing held upon said contest the U. S. local land officers at Alliance, Nebraska, decided that the contestant had not proven his case, that the heirs of the entryman had gained title to the land by five years of cultivation and recommended that the contest should be dismissed. Contestant appealed from this decision, but same was fully affirmed by the Commissioner of the General Land Office on September 27, 1911.

IX. That upon further appeal taken by the said Allen G. Fisher the then First Assistant Secretary of the Interior, who served under the predecessor of the present Secretary and defendant here, on February 28, 1913, reserved the said de-

(Page 84.)

cisions of the local and General Land Offices and ruled that the death of the said Hilan N. Rule, without establishing residence and terminated the entry and that his heirs succeeded to no right whatever in the land.

X. That your petitioner duly and seasonably filed a motion for rehearing of the said decision with the then First Assistant Secretary, and such motion was on April 17, 1913, denied by the Assistant Secretary, and on the 2nd day of May, 1913, said homestead entry was cancelled in the General Land Office.

XI. That on May 13, 1913, your petitioner filed before the Interior Department a petition for the exercise of the supervisory authority of the Honorable Secretary and presented argument in support thereof, both orally and by [breif].

This petition was on July 19, 1913, denied by the First Assistant Secretary of the Interior.

XII. That prior to the rendition of the said decision of February 28, 1913, the Interior Department had since the year 1875 consistently, continuously, and uninterruptedly held

and decided that upon the death of a homesteader within six months after entry and before establishing residence, his rights passed to his heirs and that they could complete title and secure patent by cultivating the land without residence upon it; many of these decisions being published in the printed volumes of the Land Decisions issued by the Interior Department, and in the absence of any ruling to the contrary during a period of more than thirty-seven years, they constituted a rule of property upon which your petitioner had the right to and did rely.

(84.)

91 XIV. Your petitioner [furthur] avers that it was the plain, unqualified, absolutely and peremptory duty of the said Secretary of the Interior by virtue of his official position, to order a dismissal of the said contest brought against said entry by Allen G. Fisher and to have held the said entry intact by virtue of petitioner's compliance with the law since the death of entryman, and after cancelling the said entry to have reinstated the same of record; and that notwithstanding

(85.)

the petitioner's right to such action, said Secretary of the Interior has wrongfully, and in violation of the law, and in disregard of the said right of the petitioner neglected, failed and refused to order a rejection of the said contest and a reinstatement of the said entry, and that the said Secretary of the Interior although a demand has been made upon him by the petitioner therein—still neglects, fails, and refuses to recognize the right of the petitioner and to [reinstat] said homestead entry.

XV. Petitioner further avers that it was plain, unqualified, absolutely and [premptory] duty of the said Secretary of the Interior, by virtue of his official position, to direct the local land officers at Alliance, Nebraska, to issue final certificate and patent upon the said homestead entry and the final proof made thereon; and that notwithstanding the petitioner's right to such final entry and patent, said Secretary of the Interior has wrongfully, and in violation of law, and in disregard of the said right of the petitioner, neglected, failed and refused to order such final entry allowed and patent issued, and still neglects, fails, and refuses so to do.

XVI. The record before the Secretary of the Interior having shown, and the fact being, that the said Hilan N. Rule died only thirty one days after making entry, and while engaged in preparations to establish residence upon the land

entered, and that his heirs thereafter cultivated and improved the land for more than five years, as required by Sections 2289 and 2297 of the U. S. Revised Statute; it was not competent for the said Secretary of the Interior to sustain the contest filed against the said entry, or to direct cancellation of the said entry, or to deny the motions presented by petitioner, for rehearing of the said case or for exercise of the Department's supervisory authority.

XVII. The record before the Department having shown, and the fact being, that the said Allen G. Fisher having refused to pay the fees of a number of witnesses brought to the hearing in the said contest by your petitioner and the
(86.)
fees for taking their testimony all as required by Section 2 of the Act of May 14, 1880 (2 Stats., 140, 141), under which the contest was filed, it was not competent for the said Secretary of the Interior to have sustained the said contest and cancelled the said homestead entry thereunder.

XVIII. The records of the Interior Department showing, and the[fqcts] being, that for [nearll] forty years previous [Secretary's] of the Interior had consistently held that the rights of a homesteader who died within six months and before establishing residence on his homestead passed to his heirs, and such decisions having become a rule of property and well [knoen] and relied upon throughout the public land States, and relied upon by your petitioner as reason for extensively cultivating and improving this land after the death of petitioner's son; it was not competent for the Secretary of the Interior to [ave] suddenly promulgated a different rule and applied the same retroactively to an entry made and an entryman dying nine years before such change, [espicially] since said rule had during those nine years been followed and adhered to by one or more of the predesessors of the said Secretary of the Interior.

XIX. The records of the Interior Department showing, and the fact being, that your petitioner had, as heir of the said Hilan N. Rule cultivated and improved this land for five years subsequent to the death of the entryman, having
92 submitted final proof thereon, and having thereby gained title and become entitled to a patent under Sections 2291, of the U. S. Revised Statutes, it was not
(86.)
competent for the said Secretary of the Interior to cancel said entry and to refuse to reinstate the same after due demand therefor.

Petitioner therefore prays that a writ of mandamus may issue to said Franklin K. Lane, Secretary of the Interior, commanding him to grant a rehearing of said decision of February 28, 1913, and commanding him to dismiss and reject the said contest of the said Allen G. Fisher, and commanding him to reinstate said homestead entry of Hilan N. Rule for the NE ¼ of Section 22, And the N. ½ and the

(87.)

SW ¼ of Section 23, Twp 30, North Range 55 W, 6th Principal Meridian, Alliance Land District, State of Nebraska; or

That a rule on the said Franklin K. Lane, Secretary of the Interior, as aforesaid, may be granted to show cause why a writ of mandamus should not be issued for the purposes aforesaid, and your petitioner will ever pray.

SAMUEL HARRICK,
Attorney for Petitioner.

State of Nebraska,
County of Sioux—ss:

Be it remembered that on this 10th day of October, 1913, before the subscriber personally appeared Newton Rule, who being duly sworn deposes and says: that he has read the foregoing petition and knows its contents and the facts therein stated as of his own knowledge are true and correct, and those stated on information and belief he verily believes to be true.

NEWTON RULE.

Subscribed and sworn to before me this 10th day of October 1913.

(Seal) ERNEST M. SLATTERY,
U. S. Commissioner.

Return to the rule to show Cause.

Filed November 18, 1913, J. R. Young Clerk.

In the Supreme Court of the District of Columbia.

U. S. ex rel. Newton Rule
56,351 vs. At law
Frqnklin K. Lane, Secretary of the Interior.

Comes now Franklin K. Lane, Secretary of the Interior and in answer to the rule to show cause in the above entitled action says:

(88.)

By Section 441 and 453 of the Revised Statutes of the United States, respondent and his predecessors in office, as Secretary of the Interior, have at all times since the making of the entry here in question, been charged with the administration of all laws and with execution of all duties appertaining to the purchase, selling, care, and disposition of the public lands of the United States; that the administration of those laws and the discharge of those duties involve on the part of respondent the exercise of judicial functions and discretion, and not merely the performance of ministerial duties; that among these duties thus requiring the exercise of judgment and of judicial functions as aforesaid, is the decision of all questions affecting the validity of any entry made upon any part of the public domain un-

93 (Page 88.)

der the public land laws of the United States, when the same shall have been brought to his attention in the due and regular course of administration and in the manner provided by law and the regulations authorized thereunder; and that the decision of all such questions by your respondent is exclusively within his jurisdiction and is not reviewable by mandamus or other direct proceedings in any court of law or equity.

Further answering, respondent avers that in the exercise of his jurisdiction, as aforesaid, and after due notice and opportunity to be heard on the part of the relator, when the matter was brought before your respondent for examination, consideration, and determination in the due and regular course of business, respondent, exercising his judgment and discretion decided that the homestead entry by Hilan N. Rule, under which the relator claims, could not, under the law and the fact as appearing in the record then and there before him, be allowed to go to patent; wherefore he directed the cancellation of said entry, and the same was, as shown by relator's petition, in fact cancelled. He further shows that, as by relator's petition appears, legal title to said land is in the United States; and that the latter is a necessary party to this or any other suit, whereby its title is sought to be

(89.)

divested; but has not in this behalf consented to be used.

Wherefore, having fully answered the petition, respondent prays that the rule herein issued be discharged, that said

petition be dismissed, with his reasonable costs, and that he may go hence without day.

FRANKLIN K. LANE,
Secretary.

Preston C. West,
Assistant Attorney General.

F. W. Clements,
First Assistant Attorney.

C. Edward Wright, Assistant Attorney,
Attorneys for Respondent.

District of Columbia—ss:

Franklin K. Lane, being first duly sworn, says that he has read over the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein set forth he is informed are true and he believes them to be true.

FRANKLIN K. LANE,
Secretary.

Subscribed and sworn to this 17" day of November, 1913 before me,

(Seal) W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

(Endorsement)

Service acknowledged Nov. 18, 1913.

Samuel Herrick,
per E. M. Green,
Atty, for relator.

(Page 89.)

94 Demurrer.

Filed November 24, 1913. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

The United States, on the relation of Newton Rule,
No. 56351. vs. At Law.
Franklin K. Lane, Secretary of the Interior.

The relator Newton Rule says that the answer and return of the respondent is bad in substance.

SAMUEL HERRICK,
Attorney for Relator.

One of the matters of law intended to be argued is that the cancellation of the homestead entry of Hilan N. Rule, solely because of his death within six [months] after the date of the entry and prior to the establishment of residence, is not a matter solely within the judgment and discretion of the respondent as Secretary of the Interior.

SAMUEL HERRICK,
Attorney for Relator.

Endorsement: Service acknowledged this 21st day of Nov., 1913.

C. EDW. WRIGHT,
Attorney for respondent.

(Page 90.)

105 (Opinion.)

In the Supreme Court of the District of Columbia.

United States on relation of Newton Rule,
No. 56,351. vs. Law.
Franklin K. Lane, Secretary of the Interior.

The Petitioner in this case prays for a writ of mandamus against the Secretary of the Interior, commanding him to grant a rehearing in a case, and to dismiss and reject the contest of Allen G. Fisher and to reinstate the homestead entry of Highlan N. Rule, for the Northeast quarter of Section 22, and the North half, and the Southwest Quarter, of Section 23, Township 30 North, range 55 West 6th Principal Meridian, Alliance Land District, State of Nebraska.

The relator avers, that on June 28th, 1904, his son, Highlan N. Rule, made a homestead entry upon the said land, at the United States Land Office at Alliance, Nebraska.

That immediately thereafter he commenced preparations to establish his residence on said land; but in the midst of his preparations, and while actually journeying to the land, with his household goods, he became ill, and died on July 29, 1904.

That on September 12, 1904, the relator, as heir of his son, with his family, removed to said land, and lived thereon until December 19, 1904. That during the years 1905, 1906, 1907, 1908, 1909 and 1910, he cultivated a portion of the said tract of land, the amount cultivated being increased each year,

until in the year 1910 it amounted to forty acres; and that he used it also for the grazing of stock. That he improved it with a house, barn, fencing, out-house, corrals, and other improvements, at an expense of more than 1,500; and that on August 15, 1910, he submitted final proof on said entry, as required by the Statutes.

That on June 18, 1910, one Allen F. Fisher filed a contest against the said homestead entry, alleging that the entryman had died without establishing residence on said land, and that settlement upon the land had not been made by any person.

That said Fisher refused to pay the fees of witnesses

(Page 91.)

106 offered by said relator; and notwithstanding the testimony of said witnesses was not taken, the United States local land officers, at Alliance, Nebraska, decided that the contestant had not proven his case, and that the heirs of the entryman had gained title to the land by five years cultivation, and recommended that the contest be dismissed.

An appeal was taken to the Commissioner of the General Land Office, and he affirmed the said decision on September 27, 1911.

Thereupon, appeal was taken to the Secretary of the Interior, and the Assistant Secretary, on February 28, 1913, reversed the said decisions of the local Land Office, and of the said Commissioner, and held that the death of said (Note, Page 92) Highlan N. Rule, before establishing residence on said land, terminated the entry, and that his heirs succeeded to no right whatever in said land.

That the relator filed a motion for rehearing, and on April 17, 1913, the Assistant Secretary denied the said motion; and on May 2, 1913, the said entry was canceled in the General Land Office.

On May 13, 1913, the relator filed, before the Interior Department, a petition for relief, and presented argument in support thereof, both orally and by brief; and on July 19, 1913, his petition was denied by the First Assistant Secretary of the Interior.

That prior to the said decision of February 28, 1913, the Interior Department had, since the year 1875, consistently, continuously, and uninterruptedly held and decided that upon the death of a homesteader within six months after entry, and before establishing residence, his rights passed to his

heirs; and that they could complete title and secure patent, by cultivating the land, without residence upon it; and that these rulings constituted a rule of property for more than thirty-seven years, upon which the relator had a right to rely.

He avers that it was the plain, unqualified, absolute, and peremptory duty of the said Secretary, by virtue of his official position, to order a dismissal of the said contest brought against said entry by said Fisher, and to hold the said entry intact by virtue of the relator's compliance with the law since the death of the entryman; and to direct the local land officers at Alliance, Nebraska, to issue final certificate and patent upon the said homestead entry and the final proof made thereon; and notwithstanding relator's right to such final entry and patent, said Secretary refuses to

(Pages 92 and 93-94.)

107 order such final entry and patent.

That it was not competent for the said Secretary to entertain or sustain the contest filed against said entry, or to direct its cancellation, or to deny the motions presented (Page 93) by the relator, because the record before him showed that said Highlan N. Rule, died only thirty-one days after making said entry, and while engaged in preparations to establish his residence on said land; and that his heir thereafter cultivated and improved the said land for more than five years, as required by Sections 2289 to 2297 of the Revised Statutes.

The said Fisher having refused to pay the fees of witnesses, as required by Section 2 of the act of May 14, 1880, (21 Stat., 140-141), it was not competent for the said Secretary to have sustained the said contest, and cancelled the said entry. That it was not competent for the said Secretary to apply a different rule from that followed by the office for nearly forty years previous, and to make it retroactive so as to deprive the relator of his right to a patent; and he having submitted final proof, and having thereby gained title to said land, and become entitled to a patent, under Section 2291 R. S. U. S., it was not competent for said Secretary to cancel said entry, and refuse to reinstate the same.

On the filing of this petition, a rule to show cause was issued, and in response the Secretary filed a return, stating that by Sections 441 and 453 R. S. U. S., he and his predecessors, have, at all times since the making of the said entry, been charged with the administration of all laws, and with the execution of all duties appertaining to the purchase, sell-

ing care and disposition of the public lands of the United States. That the administration of those laws, and the discharge of those duties, involve on his part the exercise of judicial functions and discretion, and not merely the performance of ministerial duties. That among these duties is the decision of all questions affecting the validity of any entry made upon any part of the public domain, under the public land laws; and that the decision of all such questions is exclusively within his jurisdiction, and not reviewable by mandamus. That he, in the exercise of his jurisdiction, and after due notice (Page 94), exercising his judgment and discretion, decided that the homestead entry by Highlan N. Rule, under which the relator claims, could not, under the law and the facts appearing in the record before him, be al-
108 lowed to go to patent; therefore, he directed the can-

(Page 94 and 95.)

cellation of said entry, and the same was canceled.

He further says that legal title is in the United States, and that the latter is a necessary party to this or any other suit whereby its title is sought to be [devested]; and he therefore asks that the rule be discharged.

To this return the relator has filed a demurrer, stating that one of the matters of law intended to be argued is that the cancellation of said entry, solely because of the death of said Highlan N. Rule within six months after the date of the entry, and previous to the establishment of residence, is not a matter solely within the judgment and discretion of respondent as Secretary of the Interior.

It does not appear from the return of the respondent to the rule to show cause, just what the record was that was before him when he decided that the homestead entry of Highlan N. Rule could not be allowed to go to patent.

If, however, this record is different from the facts stated in the petition, it should have been inserted in the answer, so that the court might know what was before the respondent at the time. It not having been inserted, the Court may properly assume that the facts appearing in the petition are correctly stated.

A long line of decisions of the Land Department has been cited by the relator, showing that for nearly forty years the department has held that the heirs of an entryman were entitled to succeed to the rights of the entryman, on his death before the completion of the time in which he was required to reside upon the property in order to secure a patent.

This line of decisions seems to clearly hold that when a homestead entry is made, and the fee is paid, the entryman is given a reasonable time to remove to the land, (Page 95) six months having been considered a reasonable time to effect such actual residence; and the question in this case is,—

Was the heir of Highlan N. Rule entitled to complete his entry upon his death, after making the entry and payment of fees, but before reaching the land in question to establish actual residence thereon?

It appears that after making the entry, the decedent began his preparations to remove to the land, and while in the actual course of moving, he was taken sick, and died, before reaching the same, leaving his father his sole heir; and that his father, within less than six months from the date

(Pages 95 and 96)

109 of entry, entered upon said land, and thereafter cultivated the same, for the time necessary to entitle him to a patent, under the statutes and the then existing rules of the land department.

The local office passed upon the facts, and decided that he was entitled to the patent. On appeal to the Commissioner of the Land office, that decision was affirmed.

The petition not only shows that a portion of the land was cultivated, as required, but that actual improvements were placed upon it in good faith, amounting to more than fifteen hundred dollars; and the point is now made, that the long line of decisions of the Land Department, awarding the rights to an entryman to his heirs on his death, entitled the relator to take the steps that he has taken to secure this title, and that he has expended his money in good faith, on the strength that these decisions amounted to a rule of property, and that it is now too late for the Secretary of the Interior to change that rule of property, and make it retroactive, so as to deprive him of his vested rights.

Assuming that he has complied fully with the law as to cultivation and occupation, under the statutes and this line of decisions, it would follow that in equity his title was complete; but the evidence of legal title is the patent which the government issues to purchasers of the public lands. As-

(Page 96)

suming that this is true, should the Secretary not direct the patent to be issued and should he not refuse the contest which has been allowed on the allegations of said Allen G. Fisher?

Section 441 R. S. U. S. provides that the Secretary of the Interior is charged with the supervision of public business relating to the public lands.

Section 453 provides "That the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the survey and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

Other sections provide in more detail for the general duties of the Commissioner.

I can find no statute charging the Secretary of the Interior with the administration of all laws, and with the execution of all duties appertaining to the purchase, sale, care and disposition of the public lands of the United States as

(Pages 96 and 97.)

110 claimed in the return to the rule in this case.

The sole duty of the Secretary is that of supervision and direction. The executive duties of sale, survey, patents, homestead entries, etc., are required to be performed by the Commissioner, or other independent officers under the Commissioner, and in discharging these duties they act in a judicial character when they hear and decide contested matters.

Section 2290. Provides that persons applying for a homestead entry shall make affidavit before the Register or Receiver, that he is the head of a family, or is twenty one years or more of age, etc., and that his application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person, and upon filing such affidavit with the (Page 97) Register or Receiver, on payment of the fee required, he shall be permitted to enter the amount of land specified.

Section 2291 provides that no certificate shall be given, or patent issued, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his heir or devisee, proves, by two credible witnesses, that he or they have resided upon or cultivated the said land for the term of five years immediately

succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, etc., etc., then in such case, he or they shall be entitled to a patent.

Section 2297 provides that if at any time after the filing of the affidavit required in Section 2290, and before the expiration of the five years mentioned in Section 2291, it is proved, after due notice to the settler, to the satisfaction of the Register of the Land Office, that the person having filed such affidavit has actually changed his residence, or abandoned the land, for more than six months at any time, then, and in that event, the land so entered shall revert to the Government.

Section 2304 gives the right of entry to every private soldier and officer who has served in the army for ninety days during the civil [was], and who was honorably discharged, etc., and provides that such homesteader shall be allowed six months, after locating his homestead and filing his declaratory statement, within which to make his entry and commence his settlement and improvements.

Section 2307 provides that in case of the death of any
111 person [who] who would be entitled to a homestead

(Pages 97 and 98.)

under Section 2304, his widow, or his minor orphan children, shall be entitled to all the [benifits] enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained.

Mr. Justice Brown, in delivering the opinion of the Supreme Court of the United States, in the case of United States vs. Alabama Railroad Company, 142 U. S., 615 used this language.

"It is a settled doctrine of this Court, that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizens should be changed in such manner as to become retro-active, and to require from him the repayment

of moneys to which he had supposed himself entitled, and upon the expectation of which he made his contracts with the government. These principles were announced as early as 1827, in Edwards' Lessee vs. Darby, 12 Wheaton, 206-210, and have been steadily adhered to in subsequent decisions.

United States vs. State Bank of North Carolina, 6 Peters, 29-39;

United States vs. Macdaniel, 7 Peters, 1;

Brown vs. United States, 113 U. S., 568;

United States vs. Moore, 95 U. S., 760-763."

In the same case the court held that a construction given by the executive department for nine years, through six different administrations of that department, should be considered as decisive; and affirmed the judgment of the lower court on that principle.

There are a number of authorities that held that the substantial title passes to the heirs of the entryman after they have completed the residence or cultivation of the land for the length of time required, without the actual issue and delivery of the patent. These show that in such case the land is no longer public land, to be sold by the government to some other party.

In Bernier v. Bernier, 147 U. S. 242, where a patent was issued to a portion of the heirs of an entryman, it was held in conformity with well settled law, that where (99)

(Page 99.)

112 a patent is issued by mistake, inadvertence, or other cause to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him, thus recognizing the vested rights of those who have earned the patent by fulfilling the conditions of the homestead law.

In the case of Cornelius vs. Kessel, 128 U. S., 456, it was held that an order cancelling an entry of public land which was made in accordance with law, might be treated as void; and it was held that the Commissioner of the General Land Office, who exercises supervision over the Register and Receiver of the local land offices, can only exert such supervision when an entry is made upon false testimony, or without

authority of law, and he cannot exercise such supervisory powers so as to deprive a person of land lawfully entered and paid for.

The same argument would apply to the Secretary of the Interior, with reference to his supervisory powers over the Commissioner of the General Land office.

In the case of Butterworth, Commissioner of Patents, vs. United States ex rel Hoe, 112 U. S., 50, it was held that the supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive, does not extend to matters in which the subordinate is directed by statute to act judicially.

In that case the Secretary had directed the Commissioner not to issue a patent which the Commissioner had decided was proper to be issued; and the Court held, that in such case a mandamus should issue, requiring the patent to be granted, notwithstanding the order of the Secretary of the contrary.

In the case of Garfield, Secretary of the Interior, vs. United States ex rel Goldsby, 211 U. S., 249, it was held that the acts of public officials which require the exercise of discretion, are not subject to review in Page (100) the Courts; but if such acts are purely ministerial, or are undertaken without authority, the courts have jurisdiction and mandamus is the proper remedy.

Mr. Justice Day, said in his opinion, (on page 261;)

"It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue, if the Secretary of the Interior has acted wholly without authority of law.

(Page 100.)

113 Since Marbury vs. Madison, 1 Cranch, 137, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment, and those which are purely ministerial or are undertaken entirely without authority, which may become the subject of review in the Courts.

The subject was under consideration in Noble vs. Union River Logging Railroad, 147 U. S., 165-171; and Mr. Justice Brown, delivering the opinion of the court, cites, many of the previous cases of this court, and speaking for the court, says:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, in any view that could be taken of the facts that were laid before him, was ultra vires; and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

Again, Mr. Justice Day says, on page 262:

"There is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

The entry in this case was made in pursuance of the act of April 28, 1904, (33 Statutes, 547), allowing 640 acres of arid lands, entries to be made from and after sixty days after the approval of said act.

(Page 101.)

114 Highlan N. Rule was prompt in making his entry at the earliest moment, and seems to have been diligent in attempting to establish his residence on the tract, and the relator was prompt to establish his residence, and to cultivate the ground, succeeding the death of his son.

In an opinion given by acting Secretary Ryan, on May 25, 1914, (32 Decisions of Department of Public Lands, 653) these words were used:

"It is well settled by a long line of decisions, that where a homestead entryman dies within six months after making his entry, and without establishing residence on the land, his heirs may complete the entry by proof of cultivation and improvement of the land for the necessary period. And without the establishment of residence on the land."

In this case the Secretary cites.

Swanson vs. Wisely's heirs, 9 L. D., 31;
Stewart C. Jacobs, 1 L. D., 636;
Brown vs. Taylor, 14 L. D., 141.

To the same effect is the decision of Secretary Chandler, on September 2, 1892, reported in Grinnell vs. Wright, 15 L. D. 252.

Under the decisions of the land Department, and of the Secretary of the Interior, for many years, and under the law as determined by the Courts, and under the statutes, I am forced to the conclusion that the relator had vested rights in the property in question, by virtue of the said entry, and his settlement and cultivation, and proof thereof, such as entitled him to a patent for the said land; and in my opinion the Secretary was mistaken in supposing that he had power to change the ruling of his Department, reversing his predecessors for so many years, and making his judgment retro-active, so as to [deprieve] said relator of his vested rights; And, therefore, that the relator is entitled to the relief prayed for in his petition.

It follows that the demurrer to the return herein must be sustained.

JOE BARNARD,
Justice.

(Page 102.)

94 (Order sustaining Demurrer to Rule to show Cause.)

Supreme Court of the District of Columbia.

October term, 1913.

Proceedings before the Supreme Court of the District of Columbia, holding a Circuit Court, Division, No. 1, in and for said District, commencing the first Tuesday, it being the seventh day of October, 1913.

Tuesday October 7th, 1913.

By order of Honorable Job Barnard, Associate Justice of said Supreme Court presiding, the Court is opened by proclamation of the [Marshall], pursuant to rule of the Court.

* * * * * * *

Wednesday December 31, 1913.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

The United States on the relation of Newton Rule, Petitioner.
No. 56351. vs. At Law.
Franklin K. Lane, Secretary of the Interior, Respondent.

This cause coming on to be heard upon the petition, rule to show cause, answer of respondent, and demurrer of petitioner

to said answer, the same having heretofore been argued and submitted, it is considered that said demurrer be, and the same is hereby sustained.

(Page 104.)

115 Defts. Ex. No. 108.

Petition for Adoption.

In the County Court of Dawes County, Nebraska.

In the matter of the Adoption of Charles Andrew Fisher, a Minor Child, by William A. Fisher.

Petition for Adoption.

Comes now William A. Fisher, and respectfully shows to the Court that he resides in Dawes County, Nebraska, and that Charles Andrew Fisher, who is a minor child under the age of 14 years, to-wit: Of the age of eight years, on the 18th day of March, last past; that I do hereby declare that I do fully and voluntarily adopt said child as my own; and that I do hereby bestow upon said minor child equal rights, privileges and immunities of children born to me in lawful wedlock.

Wherefore your petitioner prays that said court will fix a a time and place for hearing this petition; that notice of said hearing may be given to all parties interested in this proceeding as required by law, and that on said hearing a decree of adoption may be rendered by said court for the adoption of said child in accordance with the conditions and stipulations to this petition, and in accordance with the relinquishment and consent of Allen Gaskell Fisher and Flora Regina Fisher, the persons having the lawful custody of said child herewith filed.

WILLIAM A. FISHER.

The State of Nebraska,
Dawes County—ss.

William A. Fisher being first duly sworn says that he has read the foregoing petition and knows the contents thereof, and that the statements therein contained are true.

WILLIAM A. FISHER.

Subscribed and sworn to before me this 8th day of May, 1913.

(Seal) ERNEST M. SLATTERY,
County Judge.

Endorsed: Filed this 8th day of May, 1913, Ernest M. Slattery, County Judge.

(Page 105.)

116 (Agreement of Adoption.)

This indenture made and entered into on this 21st day of April, A. D. 1913, by and between Allen G. Fisher and Flora R. Fisher, who are husband and wife, as parties of the first part, and William A. Fisher, as party of the second part, all parties of Chadron, Dawes County, Nebraska, is to witness: For and in consideration of certain undertaking of the said William A. Fisher, and for good and valuable considerations, the said Allen G. Fisher and Flora R. Fisher, father and mother respectively of Charles Andrew Fisher, a male child born March 18th,1905, hereby give and surrender to the said William, the said Charles Andrew Fisher, and authorize the said William to adopt, keep and care for the said Charles, and gives in advance unto the said William, the same parental control and authority which the said Allen and Flora would have if they were to retain the said Charles, and they hereby waive and relinquish unto the said William, all their claim upon the services and earnings of the said Charles and all legal right over to the said Charles, and they authorize the legal adoption of the said Charles by the said William by this deed.

And in consitleration of the premises, the said William Allen Fisher, who has heretofore been emancipated and is now competent to contract herein does hereby adopt the above named Charles Andrew Fisher and accepts him as his own son equally as if begotten by him in lawful wedlock, and declares the said Charles Andrew Fisher his lawful heir at law, and agrees that he will suitably house, nourish and clothe the said Charles and provide him with common school facilities and an opportunity for a college education as has been furnished by the said Allen and Flora unto the said William, and the said Allen and Flora hereby waive the issuance and service of any citation and enter their full and general appearance in any adoption proceeding hereafter instituted if they be advised that such is necessary on behalf of the said William to further establish his said foster parentage.

(Seal) ALLEN G. FISHER,
(Seal) FLORA R. FISHER,
(Seal) WILLIAM A. FISHER.

Witness:
C. M. Valentine.

(Page 106.)

117 The State of Nebraska,
Dawes County—ss.

Personally appeared before me, Chauncey M. Valentine, a duly appointed, commissioned, acting and qualified Notary Public for the aforesaid County, Allen G. Fisher, Flora R. Fisher, and William Allen Fisher, who are personally known to me to be the identical persons hereunto signing, and who acknowledged the act to be their free and voluntary act and deed for the uses and purposes herein set forth.

Witness my hand and notarial seal this 21st day of April, A. D. 1913.

(Seal) CHAUNCEY M. VALENTINE,
Notary Public.

My commission expires February 1st, 1915.

Endorsed: Filed May 8th, 1913.

ERNEST M. SLATTERY,
County Judge.

(Page 107.)

118 Notice of Hearing of Petition for Adoption.

In the matter of the Adoption of Charles Andrew Fisher, a Minor.

Notice is hereby given that on the 8th day of May, A. D. 1913, William A. Fisher filed his petition in the County Court of Dawes County, Nebraska, for the adoption of Charles Andrew Fisher, and on the same day, Allen Gaskell Fisher and Flora Regina Fisher, parents of the said Charles Andrew Fisher, filed their relinquishment and consent to the proposed adoption of the said Charles Andrew Fisher, and at a session of the County Court of said County, to be held at the County Court room in said County, on the 24th day of May, A. D. 1913, at 10 o'clock in the forenoon, said petition will be heard, when all persons interested in said matter may appear and show cause, if any they have, why the prayer of said petitioner should not be granted.

It is further ordered that personal service of this notice be had upon Allen Gaskell Fisher and Flora Regina Fisher ten days prior to said date of hearing.

In witness whereof, I have hereunto set my hand and affixed the seal of said County Court at Chadron, Nebraska, this 8th day of May, A. D. 1913.

(Seal) ERNEST M. SLATTERY,
County Judge.

We waive the issuance and service of any notice herein and enter our general appearance herein and consent that this order of adoption may be made without further notice.

Dated May 8th, 1913.

ALLEN G. FISHER,
FLORA R. FISHER.

Witness:
E. M. Slattery.

Endorsed: Filed May 8th, 1913.

ERNEST M. SLATTERY,
County Judge.

(108.)

96 Decree of Adoption.

In County Court for Dawes County, Nebraska.

In the matter of the adoption of Charles Andrew Fisher, A minor Child.

This cause this 24th day of May, A. D., 1913, came on for hearing on the petition of William A. Fisher, an unmarried man for the adoption of Charles Andrew Fisher, a minor child of the age of eight years, and the relinquishment and consent of Allen Gaskill and Flora Regina Fisher, parents of said minor, said petition, said minor and said parents, being present in court in person.

And thereupon upon examination of the premises and the evidence the Court finds that all persons interested in said adoption proceeding have been duly notified of the time and place for the hearing of said petition, as is required by law, and the order of this Court made and entered on the 8th day of May, A. D. 1913, and are now before the court.

It is therefore considered, ordered, adjudged, and decreed by the Court that the said Charles Andrew Fisher be and he is hereby declared to be the adopted child of the said

William A. Fisher and the said Charles Andrew Fisher shall have all of the legal rights, privileges, immunities and heirships as if he had been born to the said William A. Fisher in lawful wedlock.

In witness whereof, I have hereunto set my hand and affixed the seal of the County Court at Chadron, Nebraska, this 24th day of May, A. D., 1913.

(Seal) ERNEST M. SLATTERY,
County Judge.

Endorsed: Filed May 24th, 1913. Ernest M. Slattery, County Judge.

(Page 111.)

119 4-362 462168-6 B.

Department of the Interior,

United States Land Office,

Alliance, Nebraska
Place.

May 14, 1913.
Date.

015938
Notice of Rejection or suspension.

William A. Fisher,
Chadron, Nebraska.

Sir:

In reference to your application to make H. E. 015938 for the NE¼ Sec. 22, N½; SW¼, Section 23, Township 30 N., Range 55 W. of 6th Principal Meridian, you are advised that on May 14, 1913, the Register and Receiver of this Office Suspended the same for record evidence that applicant has

(Insert "Rejected" or Suspended" as case may be)

adopted a minor child. And for the further reason the Hon. Commissioner Gen. Land Office has this day directed by telegram that action by this office be suspended.

You are allowed thirty days from notice hereof in which to furnish required evidence or to appeal from this decision to the Commissioner of the General Land Office; and upon your failure to take such action within the time specified,

the case will be closed without further notice to you from this office. If an appeal is taken herefrom it must be filed in this office.

Please return this letter, in case you take any action or desire further information on the subject.

Respectfully,

W. W. WOOD, Register.

H. J. ELLIS, Receiver.

8-649.

(Defendant's Exhibit 101, Affidavit as to Qualifications to make Homestead Entry.)

462168—7 B. Serial No. 015938.

Received.....M.
May 6, 1913.

United States Land Office,

Alliance Nebraska.

Before the U. S. Land Office, Alliance, Nebraska. Affidavit as to Qualifications to make homestead Entry—William A. Fisher of Chadron, Neb., being duly sworn says his age is 20 years—That he is a native born citizen of the United
120 States and is head of a family by reason of having

(Pages 111 and 112.)

been lawfully released from parental authority; that he has legally and lawfully adopted a minor child, for which he is the sole and only support. That he is dependent entirely for support of himself and adopted child upon his own labors and by reason of being head of a family, he makes this application for homestead entry.

WILLIAM A. FISHER.

Subscribed and sworn to before me this 6" day of May, 1913.

Defts. ex 101.

H. J. ELLIS,
Receiver.

462168—8 B William P. Rooney.
Req papers in Allen G. Fisher
Connection with Fisher & Rooney,
his entry. Attorneys at law.

Chadron, Nebraska.

Received. Dec. 26, 1913.
Dec.
29
1913.
G. L. O.

Hon. Clay Tollman,
Washington, D. C.

Sir: I am the young man who made homestead entry serial 015938 on May 6th 1913, and who paid the cancellation on the previous entry at the Alliance Land Office and immediately went on the land and expended $700.00 in building a house and established a residence, I have never received a [filling] paper because of the fact that I was not of age although a head of a family, my post office address has been Andrews but since the heavy snow I have been temporarily employed in this office and I am now 21 years of age, I wrote you some weeks ago asking for this paper but have received no answer. Will you please ans. this.

Received
Jan.
1914
WILLIAM A. FISHER.

Defts. ex 100.

462168-9 B

In Reply Please Refer to Alliance 015938 "C" CMS

CMB

Department of the Interior,

Address General Land Office,
only the Commissioner Washington January 23, 1914.
of the General Land Office,

William A. Fisher, Report
Register and Receiver,
Alliance Nebraska.

Sirs:

William A. Fisher writes from Chadron, Nebraska, under date of December 26, 1913, stating that on May 6, 1913 he

made "homestead entry" 015938 of certain land which he does not describe. He says that he has never received "a filing paper" because of the fact that he was not of age, although the head of a family. He states that he is now twenty one years of age.

There is nothing in this office to show that such an entry or application was made by said party. You will at once report what your records show in regard thereto.

Very respectfully,

C. M. BRUCE,
Assistant Commissioner.

2-7 AtB

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121 462168-10 B

(Page 113)

In Reply Please Refer To Alliance 015938 "C" CMS

C/S Department of the Interior,

General Land office,

Washington, January 23, 1914.

Address Only The
Commissioner of the General Land Office.

Mr. William A. Fisher,
Chadron, Nebraska.

My dear Sir:

In reply to your letter of December 26, 1913, you are advised that [no] application your name appears to have been received in this office from the local land office at Alliance, Nebraska, and inasmuch as you state that you made "Homestead entry" on may 6, 1913, the local officers at Alliance have been called upon by letter of even date to report in the premises. When they shall have done so, you will be further advised.

In the meantime, it might be well for you to write to them direct in regard to the matter.

Very Respectfully,

C. M. BRUCE,
Assistant Commissioner.

1-6 ATB.

(Pages 114. and 115.)

122 462713.—1.

Department of the Interior.
Washington.

Address only
The Secretary of the Interior.
01827. May 16, 1913.

Received May 16, 1913.

The Honorable Commissioner, G. L. O.
Of the General Land Office.

Dear Sir:

With respect to the contest proceedings heretofore pending in your office and before the Department, involving Homestead Entry No. 011827, Alliance, Nebraska Land Office (D-20105), Newton Rule of Andrews Nebraska, claimant, you are advised that application for exercise of supervisory authority has been filed in this office and pending action thereon you are requested to take such steps as may be necessary, by telegraph, to suspend any further action in connection with said entry and contest, and particularly to suspend the effect of decision of May 2, of this Department in said contest proceedings.

Respectfully,
LANE.

Special
extra
Special.

Received
May
10
1913.
G. L. O.

Deft. No. 110.

462713-3. 1-080 b. Charges R.

Telegram
Department of the Interior.

Washington, D. C. September 2, 1913.

To Register, United States Land Office,
Alliance, Nebraska.

On account of suit pending in court allow no entry for north-
east quarter section twenty-two, north half and south-
123 west quarter section twenty-three, township thirty

(Page 115.)

north, range fifty-five west, until further direction.

(Sgd.) JONES,
Deft. No. 110. First Assistant Secretary.

97

462713-1.
Alliance 011827.
4-394.

Department of the Interior
General Land Office.
Washington. Copy.

Telegram.

United States Land Office,
Alliance, Nebraska.

Suspend action on letter of May second canceling entry of Rule serial naught eleven eight twenty seven. Report by mail present status of land.

PROUDFIT,
Assistant Commissioner.

Defs. ex. No. 110.

Official Business.
Government Rate.

(Page 116.)

Department of the Interior
Washington.

D-20105. Feb. 7, 1914.

Allen G. Fisher,
vs.
Heirs of Hilan N. Rule.

"H"
Alliance 011827.

Showing required.

Feb. 28, 1913, the Department on appeal found in favor of the contestant in the case of Allen G. Fisher vs. Heirs of Hilan N. Rule, involving the homestead entry of Rule, for the NE.¼ Sec. 22, and N.½ and SW¼ Sec. 23, T. 30 N., R. 55., W. Alliance, Nebraska, land district.

July 19, 1913, a motion for rehearing was denied, and on Nov. 3, 1913, a petition for the exercise of supervisory authority was likewise denied. Prior thereto, however, and on September 2, 1913, the Department directed the local officers to allow no entry for the land involved on account of a court proceeding begun in the Supreme Court of the District of Columbia, with a view to requiring the Secretary to reinstate

Rule's entry. The Court proceeding referred to resulted in a decision by the court, holding in effect that the heirs of Rule had earned title to the land and should receive patent.

(Page 117.)

Said decision was based upon the practice of this department, which had long prevailed that a homestead entryman was allowed six months after date of entry within which to establish residence, and that, therefore, Rule was not in default at the time of his death, about a month after entry, without having established residence. Furthermore, this Department, under date of January 29, 1914, in the case of Bertram C. Noble, overruled its decision of July 19, 1913, in this case, and held that it was error to revoke the long established practice of allowing six months within which to establish residence, especially as applied retroactively to the disadvantage of persons who had acted under that rule.

In view of the above, Fisher is allowed ten days from notice hereof within which to show cause, if any, why the contest should not be dismissed and the entry of Rule reinstated and passed to patent.

A. A. JONES,
First Assistant Secretary.

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98 (Praecipe by Complainant for Transcript of portions of original Certificate of Evidence.)

In the District Court of the United States of America, held within and for District of Nebraska, Chadron Division.

.. William Allen Fisher, Complainant,
vs.
Newton Rule, Defendant.

To the Clerk of said Court:

Please certify from the original certificate of evidence, in addition to this praecipe,

Page, 40—page 41, pages 43 to 60 omitting objections and ruling page 61.

Affidavit of contest document C. 7881, on pages 62 and 63 pages 64 and reverse; page 65 and reverse; pages 66, 67, 68, 69 pages 71, 72, 73, 74, and 77, 79, 82, 83, 84, 85, 86, 87, 88, 89 and 90 but omitting the opinion of the court in that case.

pages 102, 105 and 106; 108 begining with exhibit 100; page 115 copy only exhibit 110, page 116 and 117 containing letter.

ALLEN G. FISHER,
Solicitor for Complainant.

Filed Nov 5th 1915. R. C. Hoyt Clerk. By L. J. F. Iaeger, Deputy.

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100 (Praecipe by Defendant for additional portions of original Certificate of Evidence.)

To the Clerk of said Court:

In addition to the portions of the original certificate of the evidence required to be certified by the Complainant, you will include in said certificate the following additional portions of the certificate of evidence, omitted from the praecipe of said complainant, to-wit:

The balance of the decision of the Register & Receiver which commences at page 63 and is continued at page 70.

The opinion of the Commissioner of the General Land Office at pages 70 and 71.

The letter at page 76.

The opinion of the Supreme Court of the District of Columbia found on pages 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, and 100.

Petition for adoption at page 104.

Also matter appearing on page 107 and on page 111 and on page 112, to the report. also page 113, and the letter at the foot of page 114. The telegram at the foot of page 115 from Jones to the Register and Receiver.

This praecipe.

NEWTON RULE,
Defendant.

By A. W. Crites, & Sons his Attorneys.

EDWIN D. CRITES.

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99 (Clerk's Certificate to statement of Evidence pursuand to Complainant's Praecipe.)

United States of America,
District of Nebraska,
Chadron Division—ss:

I, R. C. Hoyt, Clerk of the District Court of the United States, District of Nebraska, do hereby certify that in compliance with the Praecipe, a copy of which is found attached hereto, the foregoing record has been made; and the same is a true and faithful transcript of all the matters. pages, in whole and in part, of the [procedings] of record and on file in said Court as mentioned in said Praecipe, to-wit: "Page 40- Page 41, Pages 43 to 60 omitting objections and ruling Page 61. Affidavit of contest document C 7881, on pages 62 and 63. Pages 64 and reverse; Page 65 and reverse; pages 66, 67, 68, 69, Pages 71, 72, 73, 74, and 77, 79 82, 83, 84, 85, 86, 87, 88, 89 and 90 but omitting the opinion of the court in that case. Pages 102, 105 and 106; 108, begining with exhibit 100; Page 115 copy only exhibit 110—page 116 and 117, containing letter." and as the same have been designated by Counsel.

Seal
U. S. Dist. Court
Dist. of Nebr.
Chadron Div.

Witness my hand and the seal of said Court at Chadron, in said District, this 6th day of November, A. D. 1915.

R. C. HOYT,
Clerk.
By L. J. F. Iaeger,
Deputy.

Documentary
Stamp
Cancelled
Nov. 6, 1915.

21,400 wds.	32.10
Certificate & seal	.35
Revenue stamp	.10
	$32.55

Paid in Cash Nov 11th 1915 R. C. Hoyt Clerk, By L. J. F. Iaeger Deputy.

Filed Nov 16, 1915. John D. Jordan Clerk.

124 (Clerk's Certificate to Supplemental transcript on Praecipe of Appellee.

United States of America,
District of Nebraska,
Chadron Division—ss:

I, R. C. Hoyt, Clerk of the District Court of the United States, District of Nebraska, Chadron Division, do hereby certify that in compliance with the Praecipe, a copy of which is found on front page hereof, the foregoing record has been made; and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said court as mentioned in said Praecipe, in the case of William Allen Fisher vs. Newton Rule, No. 5 Equity Docket.

Seal
U. S. Dist. Court
Dist. of Nebr.
Chadron Div.

Witness my hand and the seal of said Court at Chadron, in said district, this 12th day of November A. D. 1915

R. C. HOYT,
Clerk.

By L. J. F. Iaeger,
Deputy.

Documentary
Stamp
Cancelled
Nov. 12, 1915.

Fees. .....

6,900 [word] @.15¢ ..... $10.35.
Certificate & Seal ..... .35
Revenue Stamp. ..... .10

$10.80

Filed Dec 6, 1915. John D. Jordan, Clerk.

And thereafter the following proceedings were had in the Circuit Court of Appeals, in said cause, viz:

(*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4525.

WILLIAM ALLEN FISHER, Appellant,

vs.

NEWTON RULE.

The Clerk will enter my appearance as Counsel for the Appellant.

ALLEN G. FISHER,
Chadron, Nebraska.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 13, 1915.

(*Appearance of Counsel for Appellee.*)

The Clerk will enter *my* appearance as Counsel for the Appellee.

ALBERT W. CRITES,
EDWIN D. CRITES,
FREDERICK A. CRITES,
All of Chadron, Nebr.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 3, 1915.

(*Order of Submission.*)

December Term, 1915, Wednesday, January 5, 1916.

This cause having been called for hearing in its regular order, and counsel for appellant not appearing to present an oral argument, the same as to said appellant is taken as submitted on his brief, thereupon, the cause was argued by Mr. Edwin D. Crites in behalf of appellee and was then submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein. And by consent of counsel for appellee the record and the briefs in this cause are to be submitted to Judge Hook also as a third Judge in this cause.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1916.

No. 4525.

WILLIAM ALLEN FISHER, Appellant,

vs.

NEWTON RULE, Appellee.

Appeal from the District Court of the United States for the District of Nebraska.

Mr. Allen G. Fisher filed a brief for Appellant.

Mr. Edwin D. Crites (Mr. F. A. Crites and Mr. Albert W. Crites were with him on the brief), for appellee.

Before Hook and Smith, Circuit Judges, and Reed, District Judge.

HOOK, *Circuit Judge,* delivered the opinion of the Court:

This is a suit by Fisher to have Rule declared a trustee for him of a tract of land in Nebraska and for the execution of the trust by an appropriate conveyance. On final hearing the trial court dismissed the bill of complaint and Fisher, the plaintiff, appealed.

The defendant obtained a patent for the land from the United States in 1914 by completing as the heir of a deceased entryman a homestead entry initiated in 1904. The father of plaintiff contested the entry before the officials of the land office and the Secretary of the Interior, but finally failed. The details of this contest need not be set forth since plaintiff can gain nothing by it. He was not a party to it nor in privity in a legal sense with the contestant. He applied to enter the land as a homestead at a time when the Department had decided the contest against the defendant but the decision was subsequently revoked and the latter was awarded the final certificate upon which a patent was issued. The plaintiff's application to enter the land with his supporting affidavit stated that though he was not of age he was the head of a family by reason of his adoption of a minor child of which he was the sole and only support. The application was suspended for proof of the adoption and plaintiff was notified that if he failed to furnish the proof by a time fixed his case would be closed without further notice. He neither furnished the proof nor appealed from the ruling.

It is manifest that plaintiff is in no position to question defendant's patent with the validity of which the Government is satisfied. Much less is he entitled to a decree that the title evidenced by it shall inure to him as though he had lawfully entered the land and performed the duties requisite under the homestead law. This

being so the real facts of the pretended adoption of a minor child are not important.

The decree is affirmed.

Filed May 16, 1916.

(*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1916, Tuesday, May 16, 1916.

No. 4525.

WILLIAM ALLEN FISHER, Appellant,

vs.

NEWTON RULE.

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Newton Rule have and recover against William Allen Fisher the sum of twenty dollars for his costs herein and have execution therefor.

May 16, 1916.

(*Petition for Appeal to Supreme Court U. S.*)

May it Please the Court:

The applicant herein deeming himself aggri-ved by the judgment and opinion in this court given on May 16th 1916, and desiring that he be allowed to appeal from such judgment unto the said Supreme Court of the United States, now prays that his broad appeal may be allowed by this Court.

ALLEN G. FISHER,
Solicitor for Appellant.

Allowed this 7th day of July 1916 and bond fixed at $500.00.

WALTER I. SMITH,
United States Circuit Judge, Eighth Circuit.

THE STATE OF NEBRASKA,
Dawes County, ss:

Before the undersigned, a notary public in and for said county personally appeared Allen G. Fisher, who being by me first duly sworn

upon his oath says—that he is one of the attorneys for complainant and appellant, and that the amount in controversy in said cause, exclusive of costs, exceeds Five Thousand Dollars.

ALLEN G. FISHER.

Subscribed and sworn to before me this 26th day of June 1916.

JAMES F. LAWRENCE,
Notary Public in and for said County.

My notarial commission expires —— — ——.

(James F. Lawrence, Dawes County, Nebraska, Commission expires July 2, 1919. Notarial Seal.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals, July 7, 1916.

(*Assignment of Errors on Appeal to Supreme Court U. S.*)

This appellant, for his appeal unto the Supreme Court states that each of the following assignments of error, found in the judgment given herein on May 16th 1916, was prejudicial to him, viz:

1. The court erred in holding in effect that the appellant was not in equity the preferred owner of title to the land in suit.

2. The court erred in ignoring the findings by the Secretary of the Interior to the effect that appellant "had legal and equitable rights" by virtue of having placed valuable improvements upon the land in suit, under an entry made after the said Department and local land office had cancelled the entry of Hilan N. Rule, under whom appelle claims.

3. The court erred in ignoring the fact that appellant after he had attained his majority, was in possession of said land; under improvements worth $700.00, and actual residence; and that he never had notice of the rule to show cause against a re-instatement of the said decedent's cancelled entry, on March 13th, 1913.

4. The court erred in failing to give full force and effect to the decision of the land department of the United States and of the Secretary of Interior, in cancelling the entry of decedent Hilan N. Rule, under which appellee claims.

5. The court erred in holding in effect that the Appellant's title and right to said land had been adversely determined and adjudicated against him by Secretary of Interior.

6. The court erred in holding in effect that the appellant might be deprived of his equitable and legal rights found in his favor by Secretary, by a new decision by said Secretary without notice or process to Appellant, and without his day in court.

7. The court erred in holding as matter of law that it was not necessary for a homestead applicant to establish a settlement or residence thereon prior to his death, as a precedent condition to the right of his heir to perfect title to said lands under the homestead laws of the United States.

8. The court erred in holding in effect that the secretary of the Interior was not bound to obey, and give effect herein, to the holding of the Supreme Court of the United States in Moss v. Dowman 176 U. S. 413, by which opinion and the law therein contained, this appellee is shown disqualified to hold this homestead entry of decedent, while said Newton Rule was earning for himself an adjacent section under homestead laws.

9. The Court of Appeals erred in its opinion in holding that the appellant had not furnished to the General Land Office proof of his adoption, as required by the order.

10. The Court of Appeals erred in considering at all the effect of the acts of complainant relative to his filing, and at the same time in ignoring that complainant had resided upon this land after his homestead entry, and made valuable improvements and residence after he attained his majority, which was long prior to the order to show cause to contestant.

11. The court erred in holding in effect, that the secretary of the Interior is not bound to enforce the decisions of the supreme court construing the land statutes of the United States.

12. The court erred in failing to be bound herein by the rule of the supreme court, and in excusing the secretary of the Interior when he has refused to be bound by the rule of the supreme court in the like case of Whitney v. Taylor decided in 158 U. S. at page 85.

12. The court erred in failing to hold against the improper construction of the law, by the secretary of the Interior, in conformity with the holding of the supreme court in Wisconsin Central R. R. Co. vs. Forsythe, decided in 159 U. S. at page 46—while a decision following that rule would demand the secretary to hold the law in favor of complainant, and not thru 'his office' collusion to hold for the defendant.

13. The court erred in failing to reverse the lower court.

14. Each court erred in giving judgment against complainant.

Wherefore complainant who appeals herein prays for a reversal of each court and for decree for complainant.

ALLEN G. FISHER,
Solicitor for Complainant, Appellant.

Presented, and allowed, July 7, 1916.

WALTER I. SMITH,
United States Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, July 7, 1916.

(*Bond on Appeal to Supreme Court U. S.*)

Know all men by these presents: That we, William Allen Fisher as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto Newton

Rule in the sum of five hundred dollars, lawful money of the United States to be paid to him and his executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, personal representativ-s firmly by these presents.

Sealed with our seals this 27th day of June A. D. 1916.

Whereas the above named William Allen Fisher has prosecuted an appeal to the Supreme Court of the United States to reverse a decree and judgment on appeal in the above entitled action by the United States Circuit Court of Appeals, Eighth Circuit;

Now, therefore, the condition of this obligation is such that if the said William Allen Fisher shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

WILLIAM ALLEN FISHER, [SEAL.]
UNITED STATES FIDELITY & GUARANTY
COMPANY OF BALTIMORE MARYLAND,
[SEAL.] By FREDERICK A. CRITES &
EDWIN D. CRITES,
General Agents. [SEAL.]

In presence of
ALLEN G. FISHER.

* * * bond is approved both as to sufficiency and form this 7th day of July 1916.

WALTER I. SMITH,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, July 7, 1916.

(*Order Allowing Appeal to Supreme Court U. S.*)

The Appellant, who was complainant below, having now presented his application for allowance of appeal to the United States Supreme Court, together with the assignments of errors claimed by him in the decision and judgment of this court, his supersedeas bond, which is approved, and the waiver of service of citation by appellee, the said assignment and appeal is allowed, and the clerk is directed to certify the record on appeal, as printed, and these procce-dings and allowance to the supreme court.

Dated July 7, 1916.

WALTER I. SMITH,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, July 7, 1916.

United States Circuit Court of Appeals, Eighth Circuit.

#4525.

WILLIAM ALLEN FISHER, Appellant,

v.

NEWTON RULE, Appellee.

UNITED STATES OF AMERICA, *ss:*

To Newton Rule:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 27th day of July, A. D. 1916, pursuant to an order allowing an appeal filed in the office of the clerk of the United States Circuit Court of Appeals, Eighth Circuit from a final decree of affirmance filed and entered on *th* the 16th day of May A. D. 1916 in that certain appeal, being in equity No. 4525, from the United States District Court for the District of Nebraska, wherein William Allen Fisher, complainant was appellant and Newton Rule, defendant was appellee, and said William Allen Fisher is herein appellant, and you are appellee, to show cause, if any there be, why the decree and judgment rendered upon said appeal against said appellant, as in the said order allowing appeal mentioned, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 7th day of July A. D. 1916 and of the Independence of the United States of America the one hundred and fortieth.

WALTER I. SMITH,
United States Circuit Judge for the Eighth Circuit.

Received copy of this citation, and we hereby waive the service of the above citation on us, and consent that said citation, with this waiver, may be filed as complete service upon us, and as our appearance on said appeal.

E. D. & F. A. CRITES,
Solicitors for Appellee, Newton Rule.

[Endorsed:] No. 4525. United States Circuit Court of Appeals, Eighth Circuit. William Allen Fisher, Appellant, vs. Newton Rule, Appellee. Citation. Filed Jul- 7, 1916. John D. Jordan, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed pursuant to the præcipe of counsel for appellant under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein William Allen Fisher is Appellant and Newton Rule is Appellee, No. 4525, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of August, A. D. 1916.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Aug. 3, 1916. John D. Jordan.]

Endorsed on cover: File No. 25,624. U. S. Circuit Court Appeals, 8th Circuit. Term No. 794. William Allen Fisher, appellant, vs. Newton Rule. Filed November 27th, 1916. File No. 25,624.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

WILLIAM ALLEN FISHER, Appellant,

v.

NEWMAN ERB.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF APPELLANT.

ALLEN B. FISHER, [illegible]
[illegible]
JOHN T. [illegible]
[illegible]

INDEX

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

WILLIAM ALLEN FISHER, Appellant,

v.

NEWTON RULE

No. 329.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE

This is an appeal from a decree dismissing the bill of complaint in which the opinion of district court is:

> "The plaintiff has not established a right to the relief prayed for. The Secretary of the Interior correctly construed the statutes of the United States relating to proof by heirs of such entryman in holding that the heirs of such entryman were not required to maintain residence upon the land entered as a homestead and a patent was properly issued to the defendant. The plaintiff, by his proceedings looking to entry of the land in controversy, gained no rights as against the defendant's title under his patent."

The printed record is here referred to as P. R. and the following figures denote the page thereof

Upon appeal, Circuit Court of Appeals approved this P. R. 117.

Hook, Circuit Judge, delivered the opinion of the Court:

"This is a suit by Fisher to have Rule declared a trustee for him of a tract of land in Nebraska and for the execution of the trust by an appropriate conveyance. On final hearing the trial court dismissed the bill of complaint and Fisher, the plaintiff, appealed.

The defendant obtained a patent for the land from the United States in 1914 by completing as the heir of a deceased entryman a homestead entry initiated in 1904. The father of plaintiff contested the entry before the officials of the land office and the Secretary of the Interior, but finally failed. The details of this contest need not be set forth since plaintiff can gain nothing by it. He was not a party to it nor in privity in a legal sense with the contestant. He applied to enter the land as a homestead at a time when the Department had decided the contest against the defendant but the decision was subsequently revoked and the latter was awarded the final certificate upon which a patent was issued. The plaintiff's application to enter the land with his supporting affidavit stated that though he was not of age he was the head of a family by reason of his adoption of a minor child of which he was the sole and only support. The application was suspended for proof of the adoption and plaintiff was notified that if he failed to furnish the proof

by a time fixed his case would be closed without further notice. He neither furnished the proof nor appealed from the ruling.

It is manifest that plaintiff is in no position to question defendant's patent with the validity of which the Government is satisfied. Much less is he entitled to a decree that the title evidenced by it shall inure to him as though he had lawfully entered the land and performed the duties requisite under the homestead law. This being so the real facts of the pretended adoption of a minor child are not important."

The decree is affirmed .

The bill, to which is exhibited two decisions of the Secretary of Interior, alleges that patent to section under Kinkaid Act, issued to heirs of Hilan N. Rule; that defendant as father claims entire title thereunder; that defendant on June 28, 1904 entered as his own homestead, and finally patented his own Kinkaid homestead, consisting of an entire section adjoining the section herein in controversy; that Hilan N. Rule on the same day entered this tract in controversy, and died July 28, 1904, after a period of thirty days only, wherein he never saw, nor made settlement on, went upon, improved or established residence; that defendant made final proof on said entry for himself as heir on the same day he patented his own adjacent section; that Allen G. Fisher contested the said entry of deceased Rule, on the ground that he never established residence upon said tract, nor made settlement, nor resided thereon, and heirs never cured the laches; that Secretary decided said contest in favor of contestant and ordered said entry of decedent

cancelled and awarded contestant a preference right; that later he gave the same decision on rehearing, upon the authority of Adams v Church 193 U. S. 510; and Moss v Dowman 176 U. S. 413; and Whitney v Taylor 158 U. S. 85; that the said entry was cancelled on May 4, 1913, and on May 6th, 1913 at the U. S. Land Office, Alliance, Nebraska, which is the appropriate office therefor, finding the said land vacant complainant made homestead entry of said identical section, entered and settled on said tract and made valuable improvements thereon, as found by the Secretary in his opinion and decision July 13, 1913; that this complainant never had notice, or knowledge of further proceedings therein; but, that by collusion between defendant and the law officers of Land department of Secretary of Interior, this defendant began mandamus against Secretary Lane in supreme court of District of Columbia, to require the reinstatement of the said entry of decedent Hilan N. Rule; that contestant nor complainant ever had notice or actual knowledge of said proceedings until after the secretary of interior through his law officers in said suit had agreed with this defendant, and performed their agreement and defendant had performed his agreement also, to the effect that defendant should dismiss his mandamus action and secretary would re-instate the said entry of deceased entryman and pass said entry to patent; and that such proceedings were had that the mandamus action was dismissed and an order made re-instating said entry and it now culminated in the patent whereunder defendant claims, which was issued about May, 1914; that complainant is in possession of said entry tract, residing in his dwelling house erected thereon pursuant to his entry of May 6, 1913; that no notice

of these proceedings were ever given complainant, and he made his entry of said vacant and unoccupied land, on the faith of the vacant land and records of the United States.

P. R. Page 3-19.

The answer admits defendant's claim of title under said patent; that he was father and sole heir of entryman who entered said land on June 28, 1904 and on June 29, 1904 while preparing to settle upon said land, fell sick and of said sickness died intestate; that within six months after the date of entry this defendant made settlement, residence, improvement and cultivation on said land; and continued such settlement, residence, improvement and cultivation for five years and more; and alleges the same decisions and rulings of department as in bill; that prior to said decision of February 28th, 1913, and ever since the year 1875 the Commissioner of the General Land Office and the Secretary of the Interior consistently, continuously, and uninterruptedly held and decided that upon the death of a homesteader within six months, after entry, and before establishing residence, his rights in the homestead entry passed to his heirs and they could complete title and secure patent to said lands by cultivation and improving the same without residence upon it and these rulings constitute a rule of property for more that 37 years, upon whch defendant had a right to rely; that defendant sued Secretary of Interior in mandamus and a writ of mandamus granted.

P. R. 21.

The testimony showed contestant talked with the attorney C. E. Wright, Esq. who appeared as attorney for

Secretary Lane in that mandamus suit, and Hon. Preston West, Assistant Attorney General for Interior Department, and George H. Gardner, Esq., assistant to him, and was advised in March 1914 that he had proposed to attorney for defendant herein, that if he would dismiss the mandamus action, the department would re-instate the entry and pass; and contestant therein remonstrated with Mr. West who had filed in this contest records a letter stating that the department would dismiss this contest; and then served notice on contestant to show cause against dismissal. This was March 12, 1914.

P. R. 41.

There was no notice to this complainant and he had no knowledge of these proceedings which were subsequent to cancellation of the entry made May 4, 1913, whereupon he had filed upon the land.

P. R. 57—P. R. 41.

Charles Jacoby testified: Began working on house of complainant on this land June 2, 1913. He and Frank O'Conner worked there too. Frame house twelve by twenty four feet, eight feet high, porch on it 7 x 12, seven feet high. Concrete foundation and outside sheeting, lap siding and shingle roof. Amount of lumber $339.25, hardware $20.00, labor $162.00. Entryman lived, ate and slept there.

P. R. 46.

Elizabeth Ann Duncan testified: She is the daughter

of one William Fisher, not related to complainant; he is old German who resides at Verdigree, Nebraska, In April of 1913 he visited me at my home near Rule's home, and Rule came there to see my father; I heard them converse; Rule came there to see whether he would buy his relinquishment and be ready to file on the land if he lost. He wanted to sell out for $1500.00. My father was ready to take it if he could get a chance to file on the land.

P. R. 50.

Complainant testified as to improvements, residence, settlement.

On cross examination:

Q. You know at the time that you did not have an entry?

A. No sir, I did not.

Q. Did no one ever tell you that you did not have an entry?

A. I had never been notified and thought I had.

Q. You knew your entry had been suspended?

A. I did not.

Q. When did you first hear of it?

A. When Rule told me.

Q. That was when he ordered you off?

A. Yes.

Q. Did you go?

A. No. He had some cattle on there and I told him I thought he had better move them. We talked a while and he ordered me off and I refused to go.

P. R. 54.

Defendant Rule testified as to citizenship of decedent and himself: I lived on this land in September 1904 some time; Sept. 12, 1904 to Dec. 19, 1904, I ceased to live there; I had to live on my own homestead. Complainant's house is worth about $350.00 or $400.00.

Cross examination. In 1913 I removed improvements from this homestead, a water tank and some pipe that led to the water tank from the well, but no other. About the time that I got notice from the Land Office that I had lost out on the hearing. Some lumber out of the barn but no building.

P. R. 58.

Fnal Proof of defendant for his own patented homestead, dated August 14, 1910: "I established actual residence on this land December 19, 1904. I have no personal property elsewhere except three cows at my son's place. I made no other entry or filing for public land."

P. R. 58.

Complainant offered certified copy of hte dismissal of Rule's mandamus suit against Secretary Lane.

"Filed January 16, 1914. J. R. Young Clerk. In the "Supreme Court of the District of Columbia, the 16th "day of January, 1914.

"The S. ex rel Newton Rule

v

"Franklin K. Lane, Sec'y of the Interior

At Law No. 56351

"The clerk of said court will please enter the above en- "titled cause dismissed, without prejudice.

Samuel Herrick,
Attorney for relator.

P. R. 64.

Receipt No. 181976

U. S. Land Office, Alliance, Nebraska, May 6, 1913. RECEIVED OF WILLIAM ALLEN FISHER, Chadron, Nebraska, Fifteen and no—100 Dollars in connection with Hd. Application (33rd stats. 547) Serial No. 15938

Purchase money,.....acres, at $.....per acre	
Fees	$10.00
Commission	$ 4.00
Cancellation Fee C 7881, Act Mar. 4, 1911	$ 1.00
Total	$15.00

H. J. Ellis, Receiver of Public Moneys.

Appellant is soldier in Marine Corps of this Nation, a volunteer. The child Charles is maintained by him, as scholarin Northwest Nebraska State Normal School, at Chadron, Nebraska. The Marine Corps records show this dependency.

Allen G. Fisher, the contestant was volunteer soldier of this nation during the Spanish War, and had time under his discharge for credit upon the entry awarded him, upon the cancellation of deceased Rule's entry.

This was a valuable right, which he abandoned to his son, this Appellant in consideration of the provisions for the education of the child Charles, during the declining years of Allen.

P. R. 103.

The record in this case will show that on June 28, 1904, a homestead entry was made in the name of Highland N. Rule. The moving spirit in the making of this entry was Newton Rule, the father of Highland N. Rule, and the defendant in this case, who had himself a homestead entry of land adjoining that entered in the name of Highland N. Rule. The facts rather suggest that Highland N. Rule at the date of said entry was made was in extremis, for he died July 29, 1904, never having been upon the land entered in his name. In effect, the father and defendant in this case was seeking to use the name of his son for the purpose of indirectly acquiring title to more lands under the homestead law than would have been possible in his own right. After some use of the land by Newton Rule, a mere sham in the matter of allaged compliance with the homestead law, more properly, a trespass upon the United States, proof was offered in the name of the heirs of Highland N. Rule, deceased, and at this time Allen G. Fisher instituted a contest against said entry upon the ground that there had been no compliance with the homestead law, the entryman never

having been upon the land, and, that as a consequence, upon his death, all claimed rights under the entry forfeited. This contest proceeded, through successive appeals, to the Secretary of the Interior, where the contest was sustained and the entry ordered canceled. (See Departmental decision of February 28, 1913, 42 L. D. 62). Thereafter a motion for rehearing was filed and the same was denied, 42 L. D. 64. Thereafter proceedings were instituted in mandamus in the Supreme Court of the District of Columbia, by which it was sought to compel the Secretary of the Interior to issue a patent upon the Highland N. Rule entry. These proceedings were subsequently dismissed, and thereafter the Secretary of the Interior on April 4, 1914, reopened the matter and ordered the reinstatement of Highland N. Rule's entry, upon which the patent of the United States later issued, 43 L. D. 217.

The last mentioned decision of the Department evidences that on May 17, 1913, the local officers reported that Rule's entry had been canceled upon their records on May 6, 1913, and that notice of preference right given a successful contestant by the Act of May 14, 1880 (21 Stats. 140) had issued. Further that on May 6, 1913, the date that Highland N. Rule's entry had been cancelled upon their records, one William A. Fisher, the plaintiff in this case, presented a homestead application for the land previously embraced in Highland N. Rule's entry, and that although thus advised of the intervention of an adverse claim, but without notice to such adverse claimant with opportunity to be heard, the Secretary of the Interior ordered the rejection of all conflicting applications and directed the reinstatement of Rule's cancelled entry. It is shown in this case, and was attempt-

ed to be shown in the matter while pending before the Interior Department, that William Allen Fisher, in pursuit of a right granted by the Congress of the United States, went upon this land, and, beginning on June 2, 1913, he expended in material and labor the amount of $480.00 in building a substantial house, with concrete foundation, in which he continued to live until, by letter from the Acting Commissioner of the General Land Office in November, 1918, he was excused from further residence upon the land, and, unless he is granted relief in this action, it must result that, through the unwarranted action of the Secretary of the Interior, he is deprived of substantial rights in the public land of the United States, guaranteed him under a law of the Congress of the United States.

SPECIFICATION OF ERROR.

The lower courts erred in holding as matter of law that it was not necessary for a homestead applicant to establish a settlement or residence thereon prior to his death, as a precedent condition to the right of his heir to perfect title to said lands under the homestead laws of the United States, according to the holding of this Court in that behalf in Moss v Dowman, 176 U. S. 413.

The lower courts erred in holding in effect that the Secretary of the Interior is not bound by the statutes as interpreted and declared by this Court, but might compromise away the right of Government. The lower courts erred in giving judgment against complainant.

ABANDONMENT

Love v Flahive 205 U. S. 195.
Nelson v Northern Pacific 188 U. S. 108.
Power of court to review Departmental Action.
Daniels v Wakefield, 237 U. S. 572.

Daniels v Wagner, 237 U. S. 572
Johnson v Towsley, 13 Wall. 72.
Gauthier v Morrison, 232 U. S. 452.
Edwards v Vegole, 121 Fed. 1
Nelson v Northern Pac., 188 U. S. 108
Ross v Day, 232 U. S. 110.

ARGUMENT

The Homestead Law

The homestead law is essentially a settlement law. Its foundation and accomplishment are based upon a settlement of the public lands, the foundation and creation of a home. It was the first and only law under which a title could be acquired to the public lands without a demand in the nature of a purchase. The full consideration for the grant of the title was the settlement of the public domain. This is well expressed in the decision of the Supreme Court in Adams v Church, (193 U. S. 510) wherein the court says:

> "The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. IN ENCOURAGEMENT OF SUCH SETTLERS, AND NONE OTHERS, HOMESTEADS HAVE BEEN FREELY GRANTED BY THE GOVERNMENT."

That no rights vested under the homestead entry, made in the name of Highland N. Rule, is fully demonstrated by the Departmental decisions of February 28 and July 19, 1913, hereinbefore referred to. These decisions are fully supported by the decisions of the Supreme Court therein referred to and quoted from, which constitute a judicial in terpretation of the land.

We will content ourselves with but few quotations from these decisions.

In Whitney vs. Taylor, 158, U. S. 85-95, the Supreme Court, in considering the effect of an original entry under the homestead law, similar to that made in the name of Highland N. Rule, said:

> "Indeed this declaratory statement bears substantially the same relation to a purchase under the preemption law that the original entry in a homestead case does to the final acquisition of title. The purpose of each is to place on record an assertion of an intent to obtain title under the respective statutes. This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale, for the time allowed the settler to perfect his entry and pay for the land. Johnson vs. Towsley, 13 Wall. 72, 89. By neither the declaratory statement in a preemption case nor the original entry in a homestead case is any vested right acquired as against the government. For each, fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention. It is true one must be verified and the other need not be, but this does not create any essential difference in the character of the proceeding; and when the declaratory statement is accepted by the local land officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case and its entry on the land books."

Ih will thus be seen that in the making of this homestead entry in the name of Highland N. Rule, it was but a declaration on his part of his intention to comply with the requirements of the homestead law, the first step in which,

as before stated, was the settlement to be made thereon. No such act was ever performed by the entryman, and, as a consequence, with his death all rights under the entry terminated.

Again, in Moss vs. Dowman, 176 U. S. 413, the Supreme Court, after emphasizing the fact that only actual settlers are beneficiaries under the homestead law, held:

> "Counsel says that 'a prima facie valid entry of record operates to appropriate the land covered thereby and to reserve it, pending the existence of such prior entry, from all subsequent disposition;' that by analogy to express statutory provisions, a homestead entry without settlement is adjudged to be operative for six months.

"We deem it unnecessary to consider the correctness of these rulings or the power of the land department to secure to one who has made a formal entry a certain length of time in which to perfect his settlement and improvement. The Revised Statutes in terms give no such right. It is true that section 5 of the act of May 20, 1862, c. 75, 12 Stat. 392, carried into the Revised Statutes as section 2297, provides:

> "If at any time after the filing of the affidavit, as required in section 2230, and before the expiration of the five years mentioned in section 2291, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence or abandoned the land for more than six months. But the very phraseology, 'changing residence,' 'abandoning land.' implies a settlement on the land which is changed and abandoned, and does not authorize a waiting for settlement and occupation. On the other hand, section

> 2291, Rev. Stat. providing for final proof, requires an affidavit that the applicant has 'resided upon or cultivated the same for a term of five years immediately succeeding the title of filing the affidavit.' In other words, the one section contemplates an immediate settlement and occupation, and the other provides for temporary abandonment.
>
> * * * * *
>
> "Whenever a homestead entry has been made, followed by no settlement or occupation on the part of the one making the entry, and that homestead entry has by lapse of time or relinquishment, or otherwise, been ended, any one in actual possession as a settler and occupier of the land has a prior right to perfect title thereto."

It will be further noted that in amending the homestead law, Congress provided in the Act of June 6, 1912, 37 Stats. 123:

> "Provided that when a person making entry dies before the offer of final proof, those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death, and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land."

This proviso, part of an act passed to relieve and not to increase the burdens of homestead entrymen, did not change the law as it had heretofore existed, except to specifically relieve those succeeding to a homestead entry from the re-

quirement of residence upon the land. In other respects, it is a legislative declaration of the requirements of the homestead laws, as they had existed prior to the passage of said act.

Thus, we have not only judicial interpretations of the homestead law, but a legislative construction, accomplished through amendment of the homestead law by the said Act of June 6, 1912, (supra).

JURISDICTION OF THE LAND DEPARTMENT

While it is true that the Land Department retains jurisdiction over public lands until title thereto passes through patent or otherwise, nevertheless, where claimed rights under an entry have been regularly adjudicated, the entry canceled, and the rights of others have attached to the land through settlement made thereon and improvement thereof, the former entry cannot be reinstated without at least opportunity for hearing extended to such intervening settler, and especially where, as in a case like that at bar, the claimed rights under the cancelled entry rest alone on a mere formal entry, and where its reinstatement would work a forfeiture of valuable improvements made in entire good faith and on the strength of departmental action in final cancellation of such entry. As before stated, the facts in this case suggest avarice on the part of the father, and a studied intent to circumvent the homestead law in the making of an entry in his own right, and the attempted use of the name of his son, in extremis at the time his name is used in the entry of lands adjoining that entered by his father in his own right, for thereby it is plain that he sought

to acqure lands in excess of the amount granted any individual under the homestead law.

It should also be remembered that the Secretary of the Interior not only decided against the Rule entry on Fisher's appeal in his contest case, but after extended consideration, denied a motion for rehearing. Nothing more was possible under the rules, and surely all rights under that entry were ended and it could not be resurrected so as to destroy rights acquired in the interim even if it be admitted that the Departmental construction of the homestead law, applied in its said decisions, was erroneous. No error was, however, committed in said decisions, as an examination thereof will show that they are clearly supported by both principle and authority.

After the cancellation of the Rule entry, a proceeding in mandamus was instituted in the Supreme Court of the District of Columbia against the Secretary of the Interior, to correct alleged error in Departmental decisions and to require him to reinstate the cancelled homestead entry. That Court was clearly without jurisdiction to correct the departmental decision, even if erroneous. This question was fully and elaborately discussed and the jurisdiction of the Supreme Court of the District of Columbia in such proceedings denied in U. S. Ex Rel Ness vs. Fisher, Secretary of the Interior, 223 U. S., 683.

The Supreme Court of the District of Columbia entertained jurisdiction, and although a memorandum opinion was handed down in favor of petitioner no writ ever issued,

the case being later dismissed through an understanding or agreement between counsel for Rule, defendant in this case, and certain officers of the Interior Department, by reason of which action was taken in reinstatement of the cancelled Rule entry, to the great prejudice of the plaintiff in this case, who had in the meantime entered upon the lands under a law of the United States, made a valid settlement and a large expenditure in furtherance thereof and in compliance with the homestead law. In our view, this agreement was an illegal one and thereby the jurisdiction of the Interior Department respecting this cancelled homestead entry was not restored.

The plaintiff, as before stated, expended large sums in the improvement of the tract in question. Can there be any doubt as to his right to make title for the land settled upon and improved, but for the unwarranted act of the officers of the government in reinstating the cancelled Rule entry under the illegal agreement referred to? Further, although the local officers apprised the officers at Washington of the intervening claim of William Allen Fisher, the reinstatement of the Rule entry was ordered without notice to the plaintiff or opportunity for hearing. Is he not, therefore, deprived of property without due process? We confidently assert, therefore, that the Land Department was without jurisdiction to take the action which it did in its decision of April 4, 1914, in ordering the reinstatement of the cancelled Rule entry and the rejection of the pending application by the plaintiff in this case.

EFFECT OF THE RULINGS OF THE INTERIOR DEPARTMENT

While the finding of fact by the Interior Department in a controversy falling within its cognizance is binding in later proceedings affecting the same subject matter, nevertheless, the Supreme Court has often said that it will not permit the practice of an Executive Department to defeat the obvious purpose of a statute; in other words, that the Courts are not bound by the Departmental construction of the law, and that constructions of the law made by the Interior Department must give way to those of the Courts.

In Wisconsin Central R. R. Co. vs. Forsythe, 159 U. S., 46, 61, it was said:

> "But, further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department, Johnson vs. Towsly, 13 Wall. 72; Shepley vs. Cowan, 91 U. S. 330; Quinby vs. Conlan, 104 U. S. 420; Doolan vs. Carr, 125 U. S. 618, 624; Lake Superior Ship Canal & c. Co. vs. Cunningham, 155 U. S. 354."

In the decision of April 4, 1914, setting aside the previous adjudications adverse to the Rule, entry, no attempt was even entered upon to show any error in the construction of the homestead law as made in the prior Departmental decisions. In fact, the correctness of the interpretation there was practically conceded. Reference was made to a

prior DEPARTMENTAL decision of January 29, 1914, in the matter of the homestead claim of one Bertram C. Noble, 43 L. D. 75, wherein there was a discussion of the homestead entry made in the name of a party who died before settlement actually began upon the lands. In that decision, a number of DEPARTMENTAL decisions were referred to, and it was observed, with respect to those decisions, that they were rendered both before and after the Supreme Court had held to the contrary, and the practical effect of the ruling made in that case was, that the then officers of the Interior Department preferred to be guided by the DEPARTMENTAL decisions rather than those of the Supreme Court. Surely this is an announcement wthout precedent and evidences boldness for independent thought even greater than that heretofore exhibited by any prior public official of that department.

In the case now before this Court the plaintiff, by reason of the erroneous action of the Interior Department in the reinstatement of the Rule entry and the issuance of the Government patent, when its jurisdiction was surely ended beyond recall, is forced to institute an action to declare the title thus erroneously given, as held in trust to his benefit. The case is that of an actual settler seeking to protect himself in a home established and maintained upon the public domain against one who has sought, through illegal means, to acquire a title to the public lands, without compliance with and in direct confiict with the provisions of that law.

The Supreme Court, in Ard vs. Brandon, 156 U. S. 537-543, says:

"The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon."

This principle is oftentimes announced in the later decision of the Supreme Court, and an examination thereof will show that every intendment and every reasonable doubt is in their favor. Had the Interior Department not erred in the reinstatement of the Rule entry and had Fisher made title under his settlement claim, a similar action to that here brought might have been instituted by the heirs of Rule in attempt to charge the title given Fisher in trust. In such a case could the plaintiff in that action have asked more than a consideration of his claimed legal rights under the Rule entry? Surely not, and we insist that that is all they are entitled to in this proceeding. Their rights then must depend upon the construction of the homestead law, and in THIS PROCEEDING that construction must prevail that has been laid down by the Supreme Court of the United States.

Defendant was fairly, and thoroughly characterized by the department opinion in E-2862, Ex parte Nels Ingebretsen, and this was approved by the First Assistant Secretary of Interior in the following quotation from that opinion:

"In September 1907, a special agent, on the affidavit of one Newton Rule, made an adverse report against the entry (of Ingebretsen) * * * Newton Rule (p. 80) who had lived about a mile from the land since 1904, and who made the affidavit which induced the adverse report was the principal witness for the Gov-

ernment. He was quite unfriendly to claimant—indeed, was unfriendly to many of the people in that vicinity. Much testimony was given in an effort to show that he was unbalanced mentally. Prominent county officials so testified. Rule appears to have made threats to the effect that he would report numerous homesteaders in that locality for failure to meet the requirements of the homestead laws. He became very unpopular. His ideas of the homestead laws appear, however, to be somewhat erroneous as shown by his testimony. Apart from that his testimony does not indicate a diseased mind. He rather evinces a desire to injure claimant, but his testimony in part was so inconsistent as to cast grave doubts as to its general truthfulness."

IN CONCLUSION

We think we have shown that the Highland N. Rule homestead entry was not only properly cancelled by the Interior Department, but finally cancelled, and that the subsequent reinstatement of that entry was under circumstances amounting at least to a legal fraud upon the rights of plaintiff in this action who had, after the order of cancellation, secured adverse rights through settlement, occupation and improvement under the homestead law. All questions that might be suggested, in any wise going to the qualifications of the plaintiff in respect to a homestead right, were fully eliminated before the erroneous action taken in the Departmental decision of April 14, 1914, in attempted resurrection of rights under the cancelled Rule entry, and while it was not possible for the Courts to interfere with the administration of the Land Department in the matter of disposition of public lands prior to the issuance of patent, as patent had issued, in the pending proceeding in the Court,

the decisions of the Interior Department respecting construction of the homestead law are in no wise binding or conclusive upon the Court, but rather, that the Courts must be guided by the construction given that law by the Supreme Court of the United States, which we believe, without question, establishes the invalidity in the Highland N. Rule entry.

Finally, the report shows that the plaintiff, in the lawful pursuit of a right under the public land laws, went upon this land after the cancellation of the Rule entry, and that he put lasting and valuable improvements upon the land of considerable value. These improvements were made under a color of title under the homestead laws, and the defendant, in his answer, asks for a decree "forever quieting and establishing in him as against said plaintiff the title, ownership, and right to possession of said lands, and that he be adjudged to be the absolute owner thereof." If granted, this amounts to a practical eviction of the plaintiff, and it is held by the Courts of Nebraska that the provisions of the occupying claimant's act applies to the eviction of one claiming under the homestead laws of the United States, and under that act the defendant in this action cannot succeed until the plaintiff had been fully paid the value of all lasting and valuable improvements placed by him upon the land. (See Wells vs. Cox 84 Neb., Page 26). No such payment has been tendered the plaintiff, but, on the contrary, as before asserted, the plaintiff, if he loses in this action, necessarially loses the right to the valuable improvements placed upon this land by him in good faith and in an honest effort to acquire title to the land under the invitation and oppor-

tunity extended citizens of the United States under the beneficent homestead law.

For these reasons, we submit the case with the confidence that on examination of the record, and the law applicable, this Court will grant the rightful and just claim of the plaintiff, as set forth in his petition, filed in this action.

Respectfully submitted,

John B Rooney
Albert G Fahr
William P Rooney

Solicitors for Complainant, Appellant.

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List of Cases.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 329.

WILLIAM A. FISHER, APPELLANT,

vs.

NEWTON RULE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN BEHALF OF APPELLANT.

Narrative.

In April, 1904, with regard to a specified body of grazing lands in the dry part of Nebraska, Congress amended the homestead law, so that instead of 160 acres an applicant thereunder might acquire title to 640 acres. About the same time Newton Rule, the defendant, and his family emigrated from Iowa to Nebraska, probably for the purpose of taking advantage of this generous grant. Newton Rule had an unmarried son with him, named Hilan N. Rule, and he and

his son, on June 28, 1904, each made a homestead entry of 640 acres of adjoining land. These entries were made at the district office, but Hilan N. Rule never settled upon the land embraced in his entry. He died July 29, 1904, having in no way connected himself with the land except by the declaration he made at the district office that he intended to reside upon, cultivate and improve the same and thereby acquire title under the homestead law. Though, under the decisions of the Supreme Court and the Department, the homestead law contemplates immediate residence on the land by an applicant, nevertheless, under the rulings of the Land Department, an entry is not subject to contest during the period of six months after entry, and Newton Rule, the defendant, alleges that instead of going on his own claim, as required by law, in September, 1904, he went upon his son's claim and stayed there about three months, and then established residence upon his own homestead within six months from the date of his entry. He made final proof on both claims in 1910, and that, with reference to the land entered by his son, showed that no residence was ever established by any one thereon. Newton Rule used the land mainly for grazing purposes, as he was a stock raiser. He claimed some little cultivation and that he continued to increase the area cultivated in 1904 until 1910, when he had under cultivation about 40 acres out of 640.

On June 18, 1910, Allen G. Fisher filed contest against the proof made by Newton Rule on the entry of Hilan N. Rule, charging, in substance, that the entryman never established residence upon his homestead; that his heirs had never remedied the defect.

A hearing took place and the material facts were shown to be as charged.

The contest reached the Department, and on February 28, 1913 (42 L. D., 62), the Department found, in substance, that the entryman died without having made settlement on the land, and that no settlement was ever made thereon by any legal successor; that he made entry June 28,

1904, and died July 29, 1904. The Department decided that section 2291 R. S. requires residence and cultivation for five years immediately succeeding the filing of the affidavit required by section 2290 R. S.; that while, ordinarily, no disadvan'age would accrue by delay in establishing residence, provided established within 6 months, such delay is at the entryman's risk, and should death intervene before the entryman established residence that fact could not be pleaded in lieu of compliance with the law; that the Department must hold under any fair construction of the law that where an entryman dies without having established residence his heirs succeed to no rights; that a homestead entry is no more than a declaration of intention to acquire title by compliance with the law (Whitney *vs.* Taylor, 158 U S., 95).

Newton Rule filed motion for rehearing, which was denied April 17, 1913, and the case was closed against him and the entry of his son canceled. The district officers were notified May 2, 1913, and so soon as the notice reached the district office, on May 6, 1913, William A. Fisher, the plaintiff, filed homestead application for the land, alleging, among his qualifications, that, though a minor, he was the head of a family, he having adopted a minor child. He paid for the cancellation of the Rule entry the homestead fee and commissions and received a receipt therefor from the receiver of public moneys.

The district officers did not take action upon Fisher's application until May 14, 1913, when it was suspended for record evidence of the adoption of a minor child and also because the General Land Office instructed the district officers by wire to suspend applications for the land. The evidence of adoption required was filed in the district office May 31, 1913, but in the meantime, on May 17, 1913, Newton Rule's attorney in Washington filed a petition for the exercise of the supervisory power of the secretary, and on the same day the Department telegraphed the district office to suspend action on proceedings under the cancellation of the Rule entry, and therefore Fisher's application remained sus-

pended, though he had completed and filed the evidence to the effect that he was the head of a family.

On July 19, 1913 (42 L. D., 64), the Department affirmed its decisions of February 28 and April 17, 1913, and, in discussing the arguments therein, said, in substance, that the principle announced was not a sudden and capricious determination of the homestead law, as contended by counsel for Newton Rule, but was the deliberate judgment of the Supreme Court of the United States; that said court had held from the beginning that the purpose of the homestead law, as expressed in its title, was to secure homesteads to *actual* settlers and their successors, and all others were expressly excluded from the benefit thereof (Adams *vs.* Church, 193 U. S., 516; Moss *vs.* Dowman, 176 U. S., 413).

The Department analyzed the principles decided in Moss *vs.* Dowman, and decided that whatever right Newton Rule acquired by placing improvements upon the land was in his own right and not as an heir of his son; that he had already acquired title to a homestead entry of 640 acres of adjoining land and had exhausted his right under the homestead law; that the Department was without warrant of law to issue patent on the entry and it could not as a court of equity make a rule or regulation that would sanction the patenting of public lands without authority of law and in the teeth of the decisions of the Supreme Court; that supposed equities growing out of mistaken or illy considered departmental decisions could not obviate the necessity of a legal foundation for a patent. Furthermore, that the decisions of the Department in Moss *vs.* Dowman, rendered in 1894, and the decision of the Supreme Court therein, rendered in 1900, were prior to the Rule entry and have since remained as authoritative statements of the law and binding on the Department and on the parties to the contest.

The Department pointed out that Newton Rule had already perfected title to 640 acres contiguous to the land entered by his son, and that it was by Rule's action led to believe that he had not relied upon the decisions cited by him

as the basis for his patent; that this was indicated by the fact that soon after his son's death he went upon the claim and remained there until he had to establish a residence on his own homestead; that it was clear that Rule knew the letter and spirit of the homestead law as interpreted by the Supreme Court and that he made a pretense of mere colorable compliance with the law by alleged residence for three months thereon at the very time the law required his presence on his own homestead; that the amounts expended in improvements and in breaking 40 acres were fairly offset by the nine years' use of the lands for cultivation and the grazing 75 head of cattle.

It found that Rule's complaint that Fisher refused to pay for some testimony was wholly irrelevant, and that Fisher did not refuse to pay for any testimony that it was not the duty of the district officers to exclude under the rules of practice.

Further, that corroborated affidavits had been filed in behalf of W. A. Fisher, showing that he had filed application for the land after the cancellation of Rule's entry and had placed valuable improvements thereon and had acquired both legal and equitable rights to be considered.

Shortly afterwards Newton Rule's attorney filed another petition for the exercise of supervisory power, and on September 2, by wire, the district officers were instructed by the Department to allow no entry of the land. This petition was denied November 3, 1913, and the previous three decisions were affirmed.

On November 11, 1913, Newton Rule, through his attorney, filed petition for mandamus against the Secretary of the Interior in the Supreme Court of the District of Columbia, setting up his view of the facts and law of the case and alleging that since 1875 the Department had held that upon the death of a homesteader, within six months after entry and before establishing residence, his rights passed to his heirs, who could complete title by *cultivating* the

land; that the holdings of the Department in this regard constituted a rule of property upon which Newton Rule had the right to rely, and that it was the plain ministerial duty of the Department to dismiss Fisher's contest, order the issuance of final certificate, and to patent the same. Many immaterial matters were referred to in the petition to which it will not be necessary to refer.

Under the code of the District of Columbia, the respondent may not demur to a petition for mandamus. He is required to file answer setting forth all his defense to the suit, but, instead of doing so, the Secretary filed a demurrer, though strictly in the form of an answer. It was to the effect that the Secretary of the Interior was charged with the administration of all laws and duties relating to the disposition of public lands, and that in this case he had exercised his judgment and discretion and decided that the Rule entry could not be allowed to go to patent, and therefore he had directed the cancellation thereof; that, furthermore, the legal title of the land is in the United States, which had not consented to be sued.

Rule demurred, assigning that the cancellation of the homestead entry, because of the death of the entryman within six months after entry and prior to the establishment of residence, was not a matter solely within the judgment and discretion of respondent.

On December 31, 1913, Justice Barnard, of the Supreme Court of the District of Columbia, sustained Rule's demurrer, after describing at length the averments of Rule's petition and the response of the Secretary. The court pointed out that it did not appear from the return of the Secretary just what the record was before him when he decided that the homestead entry could not be allowed to go to patent; that if the record was different from that alleged in the petition, it should have been so stated, so that the court might be advised of what was before the Depart-

ment when it took action; that the court assumed that the facts appearing in the petition were correctly stated.

The court also pointed out that the relator had cited a line of decisions covering a period of nearly 40 years, showing that the heirs of an entryman were entitled to succeed to his rights on his death before the completion of the time in which he was required to establish residence; that the entryman in this case died before he went upon the land, but his father, within less than six months, entered upon the land and cultivated the same for the time necessary to secure patent.

That the heirs of the entryman had made improvements and had expended money, relying upon the decisions of the Department, which amounted to a rule of property, and that he was entitled to rely upon such rule, which could not be changed by the Secretary to his hurt; that he having complied with the law as to cultivation and occupation, his equity was complete.

That there is no statute charging the Secretary of the Interior with the administration of all laws and with the execution of all duties relating to disposition of public lands, as claimed by respondent, and that, on the contrary, his sole duty is that of supervision.

Justice Barnard made no attempt to construe the law as *res integra*. In substance, he held that the construction of the law was not in issue, as the Secretary was estopped from construing it by the so-called rule of property; that his previous decisions on the subject had rendered the Secretary powerless to follow the law, however obvious the meaning might be; that the heir of Rule had acquired a vested right under the previous rulings of the Department which was entitled to the protection of the court.

He apparently based his decision as to the so-called rule of property and the estoppel thereby upon the leading case of U. S. *vs.* Alabama R. R. Co., 142 U. S., 615, in which this court said that in case of *ambiguity*, the judicial de-

partment will lean in favor of a construction by a department charged with the execution of a statute, and that the courts disfavor a sudden change in such construction, especially where a party had contracted upon the faith of executive construction and a change therein would require him to *repay moneys* to which he had supposed himself entitled. The railroad company had been carrying mail for years under a contract which was valid under the original construction by the Department. In 1885 a new Postmaster General decided that the railroad company had received several thousand dollars more than it ought to have received under a correct construction of the law. A reading of the decision will show that the Supreme Court thought the original construction by the Department, which had lasted through six different administrations, *was the true exposition of the law,* and several decisions were cited which were in harmony with such construction, and, in stating what Justice Barnard referred to in his decision, this court was simply emphasizing that, in case of ambiguity, the courts should give weight to the construction of the law by the Department charged with its execution.

Justice Barnard cited other cases somewhat on the same line, such as United States *vs.* State Bank of North Carolina, 6 Pet., 29; United States *vs.* Macdaniel, 7 Pet., 1; Brown *vs.* United States, 113 U. S., 568; United States *vs.* Moore, 95 U. S., 760, but we believe that this court will recognize, without further reference thereto, that these cases have no application to the question decided by Justice Barnard.

It is plainly apparent that Justice Barnard based his decision upon decisions involving *executed contracts based upon law which had been settled by construction,* and that such decisions are wholly inapposite to the case at bar, in which the heir of Rule had no contract either with the government or with his adversary, Fisher, and in which Rule is practically claiming a gratuity.

Justice Barnard did not cite any decision in any home-

stead or preemption case, and none can be cited, we believe, in which this court has held that the Land Department, in exercising illegal generous discretion in particular cases, may create a rule which will replace plainly violated law. He did not seem to consider that Hilan N. Rule never did more than declare his intention to acquire title by compliance with the law; that he only acquired a privilege, and that a homesteader acquires no legal or equitable right until he goes upon the land, as required by law. If a homestead entry may be considered the initiation of a contract, the contract in this case remained wholly unexecuted, as Rule died before he took the first step thereunder. His heirs had no other contract with the government and could have only acquired title by going upon the land and establishing residence thereon before the intervention of an adverse claim and by complying with the law as to residence and cultivation for the required period. Defendant can claim no equity. According to his opinion, this land was worth nearly $10,000 and according to the departmental decisions he had used it for 9 years for grazing purposes. His cultivation was only a pretense, as his proof shows that he claims to have increased it for every year for 6 years and until he made proof, when he was only cultivating 40 acres. He got much more out of the land than he expended on it, and he has no claim to a gratuity because of the alleged rule of property. The government gets no money from the homesteader. The entryman pays for the land by residence, cultivation and improvements—a very small consideration where the land is grazing land and does not have to be reclaimed, as in this case.

From any fair statement of the case, it seems certain that Justice Barnard acted without jurisdiction. Under the decisions of this court, it was not within his province in a pending application for patent to determine whether or not the decision of the secretary was right or wrong, as the latter was acting in the discharge of a duty imposed upon him by

law which involved the exercise of judgment and discretion and his action therein was not subject to review in the Supreme Court of the District of Columbia. This was definitely decided in United States *vs.* Fisher, 223 U. S., 683, 691, in which numerous opinions were cited. This case is before the court only because Justice Barnard acted *ultra vires* and because the Land Department erroneously acquiesced in his action.

That court was also without jurisdiction because W. A. Fisher was not made a party to the suit, though he had legal rights such as, this court has said, were entitled to the protection of the courts. He was without knowledge of the suit and subsequent proceedings until all matters involved had been arbitrarily settled against him, and A. G. Fisher, as a mere matter of form, was ruled by the Department, in February, 1914, to show cause why its previous decisions should not be vacated and his contest dismissed. Plaintiff was not even included in the notice to show cause. Though his legal and equitable rights had been formerly recognized in departmental decision of July 19, 1913 (42 L. D., 64), he was not subsequently permitted to assert them either in the court or the Department, both of which proceeded without regard to him and as if he were a complete stranger.

When Justice Barnard rendered his decision, the Department made no attempt to amend or to take an appeal. It took the matter under advisement and in some way reached the conclusion that it ought to submit to Justice Barnard's decision and to abide by the so-called rule of property. The Fishers were ignored but the attorney of the Department called in Rule's attorney and a verbal agreement was reached under which the Department agreed to recall its previous decisions, dismiss Fisher's contest, reject all applications for the land, issue final certificate and patent to the heirs of Rule, provided that Rule's attorney would dismiss, without prejudice, the suit for mandamus; and this was done by him January 16, 1914.

The Department did not immediately take action in Rule

vs. Fisher. There was a similar case pending before the Department at the time, Bertram C. Noble, and therein the Department laid the basis January 29, 1914 (43 L. D., 75), for subsequent action in Fisher *vs.* Rule, by adopting the opinion of Justice Barnard though it was not directly referred to. On page 77, the decisions in the Fisher case were held to be unwarranted. Several decisions were referred to as establishing the so-called rule of property and it was pointed out that they were rendered both before and after the decision in Moss *vs.* Dowman (176 U. S., 413), which had been relied on in the decision in Fisher *vs.* Rule. Finally, the Department alleged at the bottom of page 77, that since the date of the Moss-Dowman decision, Congress had recognized the rule of property by *extending* in some cases, the so-called period in which a homesteader may establish residence; and, as examples, pointed out three acts of Congress. This court will realize at once that such *extensions* of time by Congress have no relation to the issue either in this case or in that of Moss *vs.* Dowman. Fisher's contention is that Hilan N. Rule died before he established residence on the land and that none of his heirs ever established and maintained residence thereon and that, therefore, the final entry made by Newton Rule is void.

On page 78, the Department practically admitted that the decisions against Rule were in harmony with the law itself, but held that inasmuch as the Department had established a rule of property it was bound by it, and the law should not have been considered upon its merits as an original proposition.

Up to February 7, 1914, neither A. G. Fisher, the contestant, nor W. A. Fisher, the settler on and applicant for the land, had any notice of the suit filed in the Supreme Court of the District of Columbia by Rule, or of the subsequent proceedings therein, or of the final determination of the Department to recede from its decisions in the Fisher-Rule case. Having laid the foundation in the Noble case, the Department on said day, viz. February 7, 1914, ruled A. G.

Fisher to show cause *within 10 days from notice* why the Rule entry should not be reinstated and passed to patent. Fisher answered fully, but on April 4, 1914, the Department recalled and vacated the previous decisions, dismissed Fisher's contest, rejected all applications, and reinstated the Rule entry (43 L. D., 217).

As soon as patent issued on the entry, W. A. Fisher, on August 21, 1914, filed the present bill in the district court of the United States, Chadron division, 8th judicial circuit. The bill set up that plaintiff was the equitable owner and in possession of the land in question; that, on May 6, 1913, after the Rule entry had been canceled and while the land was vacant and unappropriated public land, he appeared before the register of the United States Land Office at Alliance, Nebraska, in the district in which the land is situated, and offered his formal application therefor; that his application was accompanied by his affidavit, showing that he was qualified to make homestead entry and that the land was subject thereto; that he paid the purchase price for the land and the commissions of the land officers and the receiver issued him a receipt therefor; that he thereupon entered upon the land, which was unoccupied, purchased and hauled building materials to the same, employed carpenters and builders, dug a cellar, laid a cement foundation and erected a substantial dwelling, containing 3 rooms, at a cost of $700; that he established residence therein, purchased all necessary utensils for comfortable living and remained in possession and, at the date of the filing of the bill, he had improvements on the land which could not be replaced at a cost of $1200, which he had placed there in reliance upon the law and the decisions of the Land Department; that defendant claims title by virtue of a patent which issued upon register's final certificate, dated May 9, 1914, purporting to convey title to the heirs of Hilan N. Rule upon an entry made June 28, 1904, by Hilan N. Rule who at the time was a resident of the state of Iowa and who never made any settlement or established residence on the land and his laches had not been

cured by his heirs. The proceedings of the Department in Fisher *vs.* Rule were cited at length and it was pointed out that in the decision of the Department of July 19, 1913, the Department found that plaintiff had at that time already placed valuable improvements on the land and had both legal and equitable rights to be considered; that plaintiff had no knowledge of the proceedings in the Supreme Court of the District of Columbia; that he believes that said court required the Department to reinstate the Rule entry because the law officers of the Department failed to make full defense and that the facts of plaintiff's claim were not brought to the knowledge of the court; that plaintiff never received any information concerning the suit in the Supreme Court of the District of Columbia until March 20, 1914, when it was ascertained that the suit had been dismissed under an agreement made between the attorney for Rule and the attorneys of the Interior Department in which the Secretary of the Interior agreed to reinstate the Rule entry and issue patent thereon without regard to the rights of this plaintiff, who is in equity entitled to have Newton Rule declared trustee of plaintiff's title.

The record of the evidence and exhibits shows that plaintiff's homestead application, filed May 6, 1913, was suspended May 14, 1913, for record evidence that Fisher had adopted a minor child and for the further reason that the district officers had been ordered by the Commissioner of the General Land Office by wire to suspend action (record, pages 82 and 103). Fisher filed the required evidence and completed his application May 31, 1913 (record, pages 82 and 105). He naturally supposed that his application had been allowed, as he never received any notice of any further proceedings until March 20, 1914, and even that did not indicate that he had no entry. He did not know that his application had been rejected until Rule ordered him off the land (record, page 57).

Upon consideration of the case, the district judge dis-

missed the bill without argument and an appeal was taken to the Circuit Court of Appeals of the 8th Circuit.

On May 16, 1916, the circuit court of appeals affirmed the district court, in an opinion delivered by Judge Hook, which seems to be based upon a statement therein as follows:

> "The details of this contest need not be set forth since plaintiff can gain nothing by it. He was not a party to it nor in privity in a legal sense with the contestant. He applied to enter the land as a homestead at a time when the Department had decided the contest against the defendant but the decision was subsequently revoked and the latter was awarded the final certificate upon which a patent was issued. The plaintiff's application to enter the land with his supporting affidavit stated that though he was not of age he was the head of a family by reason of his adoption of a minor child of which he was the sole and only support. The application was suspended for proof of the adoption and plaintiff was notified that if he failed to furnish the proof by a time fixed his case would be closed without further notice. He neither furnished the proof nor appealed from the ruling."

Allen G. Fisher probably filed the contest for the benefit of his son, but plaintiff has never claimed that he was a party to it, or in privity with contestant. He does claim, however, that he had a right to his opinion of the law and when that opinion was confirmed by four successive decisions of the Department, in the contest against Rule's entry, plaintiff had the right to rely upon the law as so settled and, in reliance thereon and when the land was vacant of record and vacant physically, he went to the district office and filed his application therefor and also took physical possession of the land and thereby acquired a legal right such as this court has said many times it will protect. See Moss *vs.* Dowman and the several decisions cited therein.

The statement by the court that plaintiff was required to furnish proof, within a fixed time, that he was the head of a family and that he neither furnished the same, nor ap-

pealed from the ruling, appears to be wholly without foundation. Fisher entered into a formal agreement with his father and mother, on April 21, 1913, under which he adopted his 8-year-old brother (record, page 103). When he filed application for the land, May 6, 1914, he filed an affidavit showing that he was the head of a family, which is sufficient in homestead cases unless challenged. No question was raised at the time, but his application was suspended May 14, 1913, for record evidence of adoption and he was allowed 30 days to furnish the same, and it was furnished on May 31, 1913, whereupon his application became complete (record, pages 82, 102-106, 119). As Fisher received no further notice, he had the right to believe that his application had been allowed, as he had a receipt for the purchase-money and had complied with all requirements. Besides, the circuit judge seemed to have overlooked the evidence which shows that before the bill was filed, *Fisher had attained his majority and had otherwise become a legal settler on the land.*

ARGUMENT.

We think it plainly apparent that the circuit court did not give the controversy a great deal of consideration. Certainly the court's argument therein is based upon error and misconception.

Under the decisions of this court in Moss *vs.* Dowman (and cases therein cited), Ard *vs.* Brandon, 156 U. S., 537; Bohall *vs.* Dilla, 114 U. S., 47; Gauthier *vs.* Morrison, 232 U. S., 452, and many other cases, Fisher *at least* acquired sufficient right and title to call into question the patent which issued to Rule without warrant of law. If the patent so issued and if Fisher acquired any right by his legal settlement, he would seem to be entitled to relief even should the court not feel fully justified by the record in finding that Fisher had acquired complete equitable title. If not entitled to a declaration of trust, the Rule patent should at

least be canceled so that Fisher could retain possession and submit his proof to the Land Department (Gauthier *vs.* Morrison, *supra*).

In Moss *vs.* Dowman, it was said that this court had again and again affirmed the proposition that the settler is the beneficiary of the pre-emption and homestead laws, which should be construed to that end. It pointed out that in Lytle *vs.* Arkansas, 9 How., 333, the claim of settlement was not a shadowy right as had been considered by some, but a substantial right and when covered by the law becomes a legal right only to be defeated by the failure of the settler to perform an annexed condition.

In Ard *vs.* Brandon, Ard made settlement, but, because of the erroneous advice given him by the district land officers, he failed to make homestead application for 80 acres of the land in question. Though he had never filed a legal application for the land, he was a qualified homesteader, made settlement, and resided on the land in good faith. The court decided that it was not Ard's fault that he failed to file a legal application and that his settlement and residence were a sufficient foundation for his title to the land.

In Bohall *vs.* Dilla, Dilla established residence in good faith, but was prevented from continuing the same by a decree of court obtained by Bohall. Both the Department and the court found that Dilla's title was sufficient.

In Gauthier *vs.* Morrison, Gauthier made settlement upon land which was shown by the government plat to be the bed of a lake and was claimed by the abutting lot owners who drove Gauthier off the land. Gauthier brought suit for possession at a time when *he was not even an actual settler and he never had filed any application,* the land being unsurveyed. The State courts dismissed the suit upon the theory that in the eye of the law the land was a body of water and that until this determination was changed by the Land Department it was not subject to settlement. This court, in an opinion by Mr. Justice Van Devanter, held

that Gauthier's right was sufficient to invoke the protection of this court; that his suit did not attack the survey; that the settlement was upon public land open to settlement by any person having requisite qualifications and that, without possession, Gauthier would not be able to pursue his right to title. He was therefore awarded possession. Fisher's position in the case at bar is analogous to that of Gauthier. He cannot remain in possession. He cannot proceed with his compliance with the law. He cannot make proof and apply for patent so long as the land is segregated from the public domain by Rule's illegal patent. It would seem that Fisher has a stronger case than Gauthier to invoke the protection of the courts. He is both a legal applicant and settler and the land is surveyed.

From our point of view, there is only one essential issue to be determined and that is whether the Land Department in such a case was justified in issuing patent to Rule simply because in the past, in some few cases, it had, under an impulse of generosity, exercised illegal and unwarranted discretion in patenting lands to parties who had failed to comply with the fundamental requirement of the homestead law.

Mr. Justice Barnard, as we have shown, did not consider the law at all. According to him, the will of Congress was not concerned in the controversy. The Land Department had here and there, beginning in 1875, by its decisions constructed a rule of property and was bound thereby, whether or not its construction was violative of the law. Thereupon the Land Department in the Noble case, still believing that the original construction was wrong, acquiesced in the decision of Justice Barnard, and, holding itself bound by its previous decisions in other cases, overruled its four decisions in the Fisher-Rule contest.

Rule, himself, has hardly insisted that the homestead law makes any exception, in requiring residence, in favor of the heirs or legal representatives of the entryman. He has, at

all times, relied upon the so-called rule of property. In view of the fact that the *identical language of the statute with regard to residence is used with reference to the homesteader and his successors,* we contend that the law cannot be construed in one case to mean that the homesteader is absolutely required to reside on the land, while, in the other, his heirs may cultivate a small portion of it, use the rest for grazing purposes and by virtue of such use acquire title thereto.

Throughout, Rule's attorney argued that the so-called rule of property originated in 1875 by departmental decision in Dorame *vs.* Towers, 1 C. L. L. (1882), 438. In that case, it appeared that the homesteader *resided on the land in good faith* from May until September, 1873, when he went to San Francisco for medical treatment. When returning to the land he fell sick. He forwarded his application to the district office and his entry was allowed, and he died before he reached the land. In said case, it was only a failure to complete his residence and the Department held that it would be sufficient if the heirs continued the cultivation for the prescribed period. It argued as follows:

> "In the case of the *original applicant, residence is undoubtedly required.* His entry, supported by his affidavit under full penalties, must be 'made for the purpose of actual settlement and cultivation,' under section 2290, and is rendered liable to forfeiture for change of residence by section 2297. *But no action to enforce a forfeiture can be instituted against the widow, heir, or devisee, as neither of these have filed the affidavit mentioned in the statute,* and been thus brought within the terms of the act authorizing the proceedings." (Italics ours.)

In other words, the successors were relieved of compliance with the statute because they did not *promise* to comply therewith. The whole decision is based upon this theory and it seems impossible to conceive how the successors of a homesteader may be relieved of the residence required by

the law simply because they did not make the original homestead affidavit declaring their intention to reside on the land. That the reason given for the decision is no reason is so obvious that no further attempt need be made to demonstrate that the Department was not really undertaking to construe the law but was exercising arbitrary discretion in order to protect the heirs in a particular case.

In many decisions and recently in the case of Daniels *vs.* Wagner, 237 U. S., 558, in an opinion delivered by Mr. Chief Justice White, this court decided flatly that the Land Department has no authority to dispose of public land except in accordance with law. In said case, it was strenuously urged that the Department had considerable latitude of discretion and was not strictly bound to follow the law in disposing of public lands. In rejecting this contention, the court said in part:

> "That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation."

And, notwithstanding the opinion of Justice Barnard, we believe we take no risk in asserting that this court has always held that erroneous decisions of the Land Department on matters of law are not binding on the federal courts. There are numberless decisions to this effect covering almost the entire existence of this court and we refer to some of them as follows: Hastings R. R. Co. *vs.* Whitney, 132 U. S., 366; Johnson *vs.* Towsley, 80 U. S., 72; Shepley *vs.* Cowan,

91 U. S., 330; Quinby *vs.* Conlan, 104 U. S., 420; Doolan *vs.* Carr, 125 U. S., 624; Lake Superior Ship Canal *vs.* Cunningham, 155 U. S., 354; Menotti *vs.* Dillon, 167 U. S., 703; Wisconsin *vs.* Forsythe, 159 U. S., 46; Northern Pacific R. R. Co. *vs.* Colburn, 164 U. S. 383; Lindsey *vs.* Hawes, 2 Black, 557; Cunningham *vs.* Ashley, 14 How., 377; Garland *vs.* Wynn, 20 How., 8; Comegys *vs.* Vasse, 1 Pet., 212; U. S. *vs.* Commissioner, 4 Wall., 565; Cornelius *vs.* Kessel, 128 U. S., 461; Minnesota *vs.* Batchelder, 1 Wall., 109.

We urge that Justice Barnard misapplied what is known as a rule of property and that such application as he made has never been suggested in any decision of this court, in which it has always been held that the Land Department has no authority to dispose of public lands except in accordance with the will of Congress as expressed in the statutes.

In Webster *vs.* Luther (163 U. S., 331), Mary Robertson made a soldier's additional entry and patent issued to her in 1888. She sold the land to Webster in 1890. Luther brought suit to have Webster declared trustee, exhibiting a power-of-attorney showing that in 1880, he had purchased her entire interest in the additional right. Webster objected to the admission of this power on the ground that it tended to prove a transaction in contravention of the laws of the United States, the Land Department having held for 15 years that soldiers' additional rights were personal and absolutely intransferable. He laid great stress upon the decisions and practice of the Land Department and the alleged rule of property thereby established, under which such rights were not assignable, and consequently a purchaser from the beneficiary did not have to guard against illegal assignments of such rights prior to entry. The court rejected this contention, saying (page 342):

> "We can not give to this practice in the land office the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different constructions, by

> one of the executive departments of the government, is always entitled to the highest respect and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute. In the present case it is our duty to adjudge that the right given by the statute in question to enter 'additional' lands was assignable and transferable."

A similar contention was settled in Moss *vs.* Dowman, 176 U. S., 413. Robert H. Doran made homestead entry of the land May 7, 1890. He sold his relinquishment thereof to Moss for $1,000, who filed the same, with her application for the land, October 24, 1890. Subsequently she established residence. Dowman made settlement September 19, 1890, while the land was segregated by Doran's entry and on November 18, he filed application at the district office and, the same being rejected for conflict with Moss' application, a contest arose which was settled in favor of Dowman.

Moss contended that under an uninterrupted chain of departmental decisions from 1859 to 1885, a period of 26 years, a valid homestead entry was sufficient to segregate the land and reserved it from all disposition for six months and that a settlement on land so segregated was a trespass by which the trespasser could gain no right, and that she, Moss, was justified in relying upon the decisions in purchasing the relinquishment and in making entry of the land. The court said that it deemed it unnecessary to consider the rulings in this respect as the revised statutes granted no such right but contemplated the immediate establishment of residence. It pointed out that section 2297, upon which the six months' period was supposed to be founded, only referred to entries in which the entryman had established residence and had subsequently abandoned it for more than six months (see page 419). Said decision disposes of every issue raised in the case at bar. The court stated on page 417, in effect, that

the obvious purpose of the homestead law is to secure to the actual settler the land upon which he settles and to give him the prior right to perfect title to the same by continuous residence.

By way of emphasis, this opinion was reiterated on the same page and was particularly emphasized on page 418, and several decisions cited, which held, in substance, that a settlement claim is not a shadowy right, as had been considered by some, and when covered by law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it (Lytle *vs.* Arkansas, 9 How., 333; Clements *vs.* Warner, 24 How., 397; Bohall *vs.* Dilla, 114 U. S., 51).

It was also held that the homestead law contemplates five years' continuous residence (page 418, citing Anderson *vs.* Carkins, 135 U. S., 487), and that section 2291 requires the applicant to file an affidavit showing that he has resided upon and cultivated the land for 5 years immediately succeeding the filing of the affidavit; that this section requires immediate settlement and occupation (page 419).

That Doran having established no residence on the land, whatever right he had was extinguished by the filing of his relinquishment and Dowman's settlement became effective *eo instanti.* It made no difference that it was purchased and filed by Moss within six months after entry (page 420-421). Hilan N. Rule did nothing but file application, declaring his intention. By analogy, whatever right he acquired was extinguished by his death, prior to settlement, which was equivalent to a relinquishment.

That where a homestead entryman makes no settlement on the land and his entry, by *lapse of time,* or relinquishment, *or otherwise,* ends, *anyone* in actual possession as a qualified settler is entitled to perfect title to the land (page 421). This is Fisher's case. He went on the land as soon as the Rule entry was canceled and established residence thereon. He is entitled to a conveyance from Rule, who

carries the record title, or else he is entitled to a cancellation of the Rule patent so that he may file his proof of compliance with the law in the Land Department.

Except in its final decision in Fisher *vs.* Rule, we know of no case in which the Land Department has held that it was bound by its erroneous decisions to adhere to a so-called rule of property therein established and it has frequently stated that it has no power to dispose of public lands in defiance of law. Certainly, in numerous cases, where the Department did not care to reverse a policy, or a line of previous decisions, it has stated that the rule of *stare decisis* is respected in the Department and will not be reversed except for cogent reasons, but we know of no case in which the Department has advisedly violated the obvious provisions of a statute by invoking such rule. In Brady *vs.* Williams (25 L. D., 60), it was urged with great earnestness that the doctrine of *stare decisis* should be applied, but the Department said:

> "While it is the policy of the Interior Department to recognize and adhere to this doctrine, yet where a construction is erroneously placed upon the law or rules and regulations which deprives persons of the exercise of their homestead rights, it will not hesitate to overrule it."

In Ernest B. Gates, 41 L. D., 384, a soldier's additional right was involved which was valid under the decisions and practice of the Department for more than 30 years, and it was urged that the changed construction should not affect the right which had been bought and located in good faith in reliance upon an established rule of property. The Department pointed out that, though it exercised judicial power, it was not a judicial tribunal and that in the case before it, it was necessary to pronounce a decision fixing the right of the party; that the rule of *stare decisis* did not prevent proper action; that in Knight *vs.* Land Association, 142 U. S., 181, the Supreme Court decided that the Secretary is the guardian of the public lands and that his oath of office obliged him to

see to it that public lands were not disposed of to a party not entitled there; that the principles settled by the Supreme Court forbade that the rule of *stare decisis* should control the Secretary in the discharge of his duties; that while the doctrine is entitled to respect, neither the courts, nor the executive departments, are bound by a previous error in law under which public lands had been illegally disposed of.

HOMER GUERRY,
Of Counsel for Appellant.

April 19, 1918.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 78

WILLIAM ALLEN FISHER, *Appellant*,
vs.
NEWTON RULE, *Appellee*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE.

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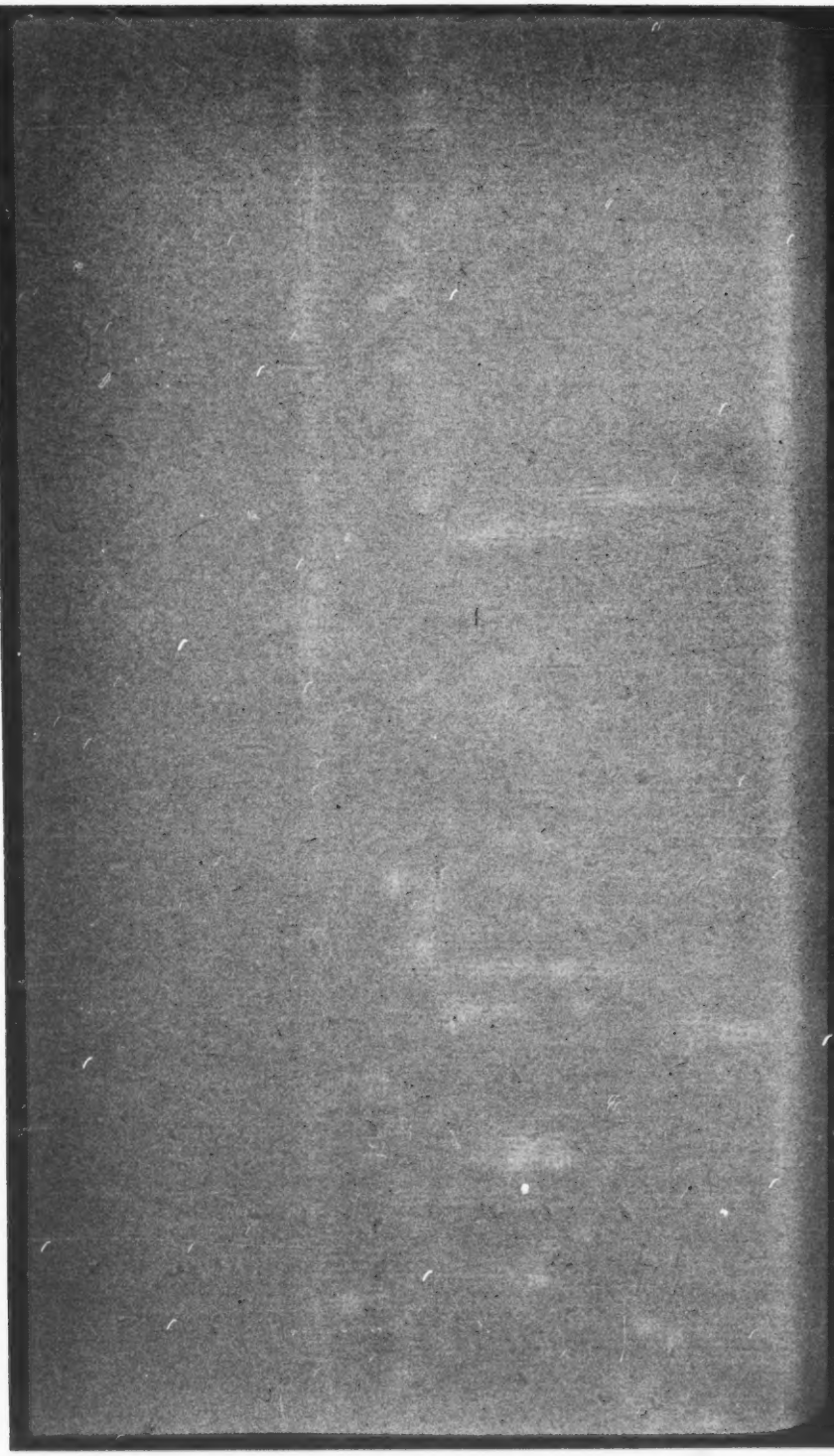

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LIST OF CASES.

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vs.

NEWTON RULE, *Appellee*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement in the brief of appellant's western attorneys is such an aggregation of fact and of fancy, of matters in the record and matters outside the record, that we feel impelled to incorporate herein a brief statement of the essential facts shown by the record to actually exist.

The land here involved, situated in western Nebraska, was entered under the homestead law by Highlan N. Rule, son of the appellee here, in the year 1904. Thirty-one days later, and while engaged in preparations to remove to this land, the entryman died. Two months after that event his father and sole heir, the appellee, moved upon the land and resided there more than three months. Some five years later and as sole heir he submitted final proof, wherein it was shown that he had improved the land to the value of fifteen hundred dollars and had cultivated a considerable portion of it each year.

Between the date of notice thereof and of the submission of this proof, Allen G. Fisher, father of the appellant here, filed a contest against this homestead entry upon the ground that the original entryman had never established residence. After hearing between the parties, the local U. S. land officers rendered decision in favor of defendant, and upon appeal by Fisher this was affirmed by the Commissioner of the General Land Office. On further appeal, however, the First Assistant Secretary of the Interior reversed both decisions below and held the entry for cancellation upon the stated ground that since Highlan Rule died without having established residence no rights passed to his heirs. A motion for rehearing of that decision was denied and the entry canceled by General Land Office letter of May 3, 1913, which reached the local land office three days later.

A few days afterward a motion for the exercise of supervisory authority was filed with the Department, and thereupon instructions were sent to the local land officers by the Commissioner of the General Land Office to suspend all action on the order of cancellation.

Another adverse decision was rendered by the Interior Department, whereupon appellee filed in the Supreme Court of the District of Columbia a petition for issuance of a writ

of mandamus against the Secretary of the Interior. Answer to this petition was filed by the Secretary, but the demurrer of petitioner thereto was sustained by the court in a lengthy opinion. The officials of the Department thereupon proposed to petitioner's attorney that if he would dismiss the petition in court, so that writ of mandamus would not issue, the case would be readjudicated by the Department and patent issued to petitioner. This proposition was accepted and the procedure agreed upon followed, though before final action Allen G. Fisher was given opportunity to show cause why his contest should not be dismissed and the patent issued, and some showing was made by him in person after he had secured an extension of the time allowed.

In the meantime and upon May 6, 1914, aforesaid, William Allen Fisher, the appellant here, had filed homestead application in the local land office for the tract here involved, claiming that while under twenty-one years of age he was the head of a family by reason of his having adopted his eight-year-old brother with his parents' consent. This application was suspended by the Register and Receiver "for record evidence that applicant has adopted a minor child, and for the further reason the Hon. Commissioner Gen. Land Office has this day directed by telegram that action by this office be suspended," subject to appeal. No appeal was taken, but on May 31st Fisher filed evidence of the decree of adoption of the minor child, rendered May 24th upon a petition filed by him May 8th.

Subsequently appellee built a house on the land and commenced residence, which continued for a few months only.

Fisher brought suit to have Rule declared a trustee for him of said tract of land and for the execution of the trust by an appropriate conveyance. On final hearing the District Court dismissed the bill of complaint, which decree was affirmed by the Circuit Court of Appeals.

ARGUMENT.

I.

Appellant Not in Position to Bring This Suit.

Irrespective of the merits of the case before the Land Department entitled Allen G. Fisher v. Heirs of Highlan Rule, the appellant in the case at bar is in no position to question the decision finally rendered therein. He was not a party to that case in any way and hence can not question the correctness of the departmental adjudication. And since his father, Allen G. Fisher—either because he was not a qualified homesteader himself, or for what reason, it matters not—chose to make no attempt to exercise his preference right, and to allow the appellant here to step in and claim the land, he also is in no position to complain of the Department's issuance of a patent to the Heirs of Rule, even if he were also a party to this case. We say "made no attempt to exercise his preference right" because while he filed homestead application on June 6, 1913, a month after his son's filing, he evidently abandoned the same and does not now claim any rights thereunder.

Furthermore, William Allen Fisher, the plaintiff and appellant here, has not performed such acts that he would be entitled to the issuance of patent even though the Rule patent should be canceled. He claims to have begun residence only on the 6th or 7th of July, 1913 (R., page 54), and to have maintained it "until Thanksgiving, off and on." (R., page 57.) There was no five years' residence, nor three years' residence, nor even fourteen months' residence, nor final proof made or tendered, by reason of which he could claim to have earned title to the land.

Furthermore, he had no homestead entry of the land nor other claim of record thereto, other than a mere suspended

application which never ripened into an entry and from the action on which he took no appeal.

Again, his establishment of residence was made nearly two months after receiving notice of the suspension of his application, not only because of failure to accompany the same with evidence of his alleged homestead qualifications, but also because of the General Land Office's telegram directing the local officers to allow no entries for this land—notice of which was duly given to the appellant here, and which surely apprised him of the fact that the Rule claim was still existent. His improvements, commenced two weeks after getting this notice, and his residence nearly two months later, were therefore not made in good faith and can not be considered the basis of a valid claim to the land.

And, finally, appellant's claim is invalidated by the circumstance of his having been under age at the time of its presentation and having committed fraud in the pretended adoption of a young brother, who continued to be maintained and supported by his father in the father's home. (R., pages 42, 43.) We shall discuss this point more fully hereinafter.

In the case of Sparks vs. Pierce, 115 U. S., 408, the court through Mr. Justice Field held:

> "To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department and being respected would have given him the patent. It must affirmatively appear that the claimant was entitled to it and that in consequence of erroneous rulings of those officers on the facts existing it was denied to him."

Again, in Lyle v. Patterson, 228 U. S., 211, which was also a suit to charge the holders of the title to real property

with a trust for the benefit of plaintiff, Mr. Justice Lamar said:

> "Lyle can only recover on the strength of his equity and not on the defects in defendant's title."

The rule is also well stated in Baldwin v. Keith, 13 Okla., 624; 75 Pac. 1124, as follows:

> "A petition is an action to declare a resulting trust which does not allege and show upon its face that the plaintiff has a better right to the land than the patentee, such as in law should have been respected by the officers of the land department and being respected would have given him the patent, does not state facts sufficient to constitute a cause of action."

See also Bertwell v. Haines, 10 Okla., 469, 63 Pac., 702; Paine v. Foster, 9 Okla., 257, 59 Pac., 252; Jameson v. James 100 Pac. (Cal.), 700; Pierson v. Loveland (Ida.), 102 Pac., 340.

In the very recent decision of this court in the case of Kirk, *et al.* v. Olson, 245 U. S., 225, in referring to the proceedings under the public land laws which culminated in issuance of patent to defendant and in affirming the decisions below refusing to disturb that patent, Mr. Justice Van Dervanter said: "Thus it appears that the irregularity complained of was not prejudicial and did not result in the issue of a patent to one when it should have gone to another. See Bohall v. Dilla, 114 U. S., 47; Sparks v. Pierce, 115 U. S., 408; Johnson v. Riddle, 240 U. S., 467, 481."

And in Campbell v. Weyerhaeuser, *et al.*, 161 Fed. Rep., 332, the Circuit Court of Appeals for the Eighth Circuit through Judge Sanborn held as follows:

> "The indispensible basis of a suit in equity to charge the legal title to land under a patent is an equitable in-

terest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the Land Department unlawfully deny. The right to an allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained."

This decision was affirmed by this court in 219 U. S., 424.

Accordingly, since for the many reasons above set forth appellant would not be entitled to a patent to this land if the appellee's patent should be set aside, his suit to establish a trust should not be sustained.

II.

The Interior Department's Final Action in Fisher vs. Heirs of Rule Was Correct.

In the bill of complaint herein, and likewise in the brief, appellant has charged that there was "collusion" between the appellee's attorney and the law officers of the Interior Department as a result of which patent issued to the heirs of Highlan N. Rule. No proof whatever was even attempted to be introduced to support this allegation, and it is needless for us to urge that same is wholly without foundation and should not be allowed a place in the record.

The fact of the matter is, as shown by the Interior Department's final decision in this case (43 L. D., 217) and by its opinion in the case of Bertram C. Noble (43 L. D., 75), that the first decisions in Fisher v. Rule were rendered because of the supposed application of certain decisions of

this court, notably Moss v. Dowman (176 U. S., 413), seeming to hold that upon the death of a homesteader within six months after the making of entry and prior to his establishment of residence no rights passed to his heirs: and without taking into consideration the fact that for more than a generation the Department had repeatedly, continuously, and consistently ruled to the contrary. The supposed application of the Supreme Court decisions mentioned we shall discuss hereinafter.

To the petition for mandamus the Secretary of the Interior filed answer averring that the decision in this and similar cases "is exclusively within his jurisdiction and is not reviewable by mandamus or other direct proceedings in any court of law or equity." (R., page 89.) In a lengthy opinion, however (R., pages 91-101), the Supreme Court of the District of Columbia through Judge Barnard held that on account of the numerous decisions rendered by successive Secretaries of the Interior from the year 1875 to the year 1913, to the effect that upon the death of a homesteader within six months after entry, without establishment of residence, his rights passed to his heirs who might secure title by making proof of cultivation only, a rule of property had grown up which could not be lightly and arbitrarily set aside by the Department, especially in such a way that parties who had contracted with the Government upon the faith of the previous construction might be prejudiced; citing United States v. Alabama Railroad Company (142 U. S., 615), Edwards' Lessee v. Darby (12 Wheaton, 206-210), United States v. State Bank of North Carolina (6 Peters, 29-39), United States v. Macdaniel (7 Peters, 1), Brown v. United States (113 U. S., 568), United States v. Moore (95 U. S., 760-763). That, accordingly, the decision of the Department in Fisher v. Rule was an attempt to exceed the powers conferred upon it, and by the exercise of arbitrary power

to deprive the relator of vested rights, citing Marbury v. Madison (1 Cranch, 137), Noble v. Union River Logging Railroad (147 U. S., 165-171), and Garfield v. United States, *ex rel.* Goldsby (211 U. S., 249).

The line of departmental decisions mentioned and which the first departmental opinions in Fisher v. Rule had set aside are collated as follows:

Stewart v. Jacobs, 1 L. D., 636, 1 Copp's Public Land Laws, 459; (December 4, 1875, Secretary Chandler).

Dorame v. Towers, 1 Copp's Land Laws, 438 (May 14, 1878, Secretary Schurz).

Townsend's Heirs v. Spellman, 2 L. D., 77 (Oct. 16, 1883, Secretary Teller).

Swansen v. Heirs of Wisely, 9 L. D., 31 (July 2, 1889, First Assistant Secretary Chandler).

Brown v. Naylor, 14 L. D., 141 (Feb. 5, 1892, First Assistant Secretary Chandler).

Grinnell v. Wright, 15 L. D., 253 (Sept. 2, 1892, First Assistant Secretary Chandler).

Ware v. Wright, 22 L. D., 181 (Feb. 17, 1896, Secretary Smith).

Makenson v. Heirs of Snider, 22 L. D., 511 (April 28, 1896, Secretary Smith).

Stevenson v. Heirs of Cunningham, 32 L. D., 653 (May 23, 1904, Acting Secretary Ryan).

Instructions, 35 L. D., 573 (May 7, 1907, Secretary Garfield).

Upon the rendition of this opinion of the Supreme Court of the District of Columbia, the Interior Department realized the serious results of the position it had first taken in Fisher v. Rule and evidently preferred to recede from that position rather than to appeal the mandamus case and come before this court in the thoroughly indefensible position of abrogating a rule of property established and maintained by

it for nearly forty years. Accordingly, it proposed to relator Rule's attorney that if he would dismiss his mandamus suit the case would be readjudicated, the Rule entry reinstated and passed to patent. This proposition being accepted, the mandamus case was dismissed without prejudice, and shortly thereafter the Department rendered decision in the Noble case (43 L. D., 75), and more than two months later the final opinion in Fisher vs. Heirs of Rule (43 L. D., 217) was handed down, after Fisher had been given opportunity to show cause to the contrary and had taken advantage of that opportunity.

It is respectfully submitted that under the broad supervisory authority reposed in the Secretary of the Interior to administer the public lands and to grant complete justice to litigants therefor, it had full jurisdiction to take the steps it did and issue a patent to the party rightfully entitled thereto. As held in Williams v. United States (138 U. S., 514, 524), and in Knight v. United States Land Association (142 U. S., 161, 181),

> "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are entrusted to the Land Department, matters not foreseen, equities not anticipated and which are therefore not provided for by express statute, may sometimes arise, and therefore the Secretary of the Interior is given that superintending and supervisory power which will enable him in the case of these contingencies to do justice."

In concluding discussion on this point, we refer briefly to the fact that at the time the Department directed suspension of action in Fisher v. Rule and the allowance of no entry for the land, contestant therein (father of the appellee here) had not applied to establish and exercise his preference right. And, further, that the same contestant had in

the hearing at the land office in that case refused to pay for Rule's testimony, as admitted by him in the hearing herein (R., page 45), so that there was some doubt as to his having ever secured a preference right since he had not "contested, paid the land office fees, and procured the cancellation" of the Rule entry, as prescribed by the act of May 14, 1880 (21 Stat., 140). However, under the facts of this case, and particularly the circumstance that contestant Fisher is not the complainant here, that phase of the case need not be discussed.

III.

Authorities Relied on by Appellant are Not in Point.

Both in his bill of complaint and in his brief appellant has relied almost exclusively upon the cases of Whitney v. Taylor (158 U. S., 85), Moss v. Dowman (176 U. S., 413), and Adams v. Church (193 U. S., 510). A careful consideration of those authorities will lead to the conclusion that they have no application to the point involved in the case of Fisher v. Rule before the Interior Department.

Whitney v. Taylor involved a *preemption declaratory statement*, and while that statement was sustained as excepting the land there involved from the railroad grant, it was compared with a homestead entry in that neither one gave "any vested right as against the Government." In the case at bar there is no question whatever of the Government's right, but instead the conflicting rights of two individuals. Furthermore, the comparison above mentioned is in the nature of *obiter dicta* and should not be applied in a case where neither the rights of the Government nor a preemption declaratory statement are involved in any way.

Adams v. Church involved an entry under the *timber culture law*, and the statement therein relative to the policy of the homestead act looking toward the holding of land

for a term of years "by an actual settler" was plainly intended to refer only to the prohibition of the alienation of the land prior to final proof and not to the devolution of the entry to the heirs of a homesteader upon the latter's death. By using the words "homesteads have been freely granted by the Government in encouragement of such settlers, and none others," the court intended to eliminate speculators and traffickers in the public lands, not the heirs of homestead settlers.

The case of Moss v. Dowman, *supra*, is the main reliance of the appellant, and it was also the authority upon which the Interior Department rendered its first decision in the case of Allen G. Fisher v. The Heirs of Rule, adversely to the defendants. While there are some expressions in that opinion which seem to sustain those decisions yet a more careful reading of same will show the contrary.

Thus the ruling of this court therein was directed against the illegal custom of an entry being relinquished a day or two before the expiration of the six months allowed by the Department for the establishment of residence, and then another entry being made by someone in collusion with the relinquisher, without the establishment of residence or the making of improvements. This court criticised that custom in forceful language, but its expressions can hardly apply in the case of an entryman who within a month after entry, and without any collusion on his part, is carried to the Great Beyond: indeed, whose death occurred while in the very act of removing his household goods to the land with the intent of establishing residence. These two cases are essentially different, and a ruling made to prevent the consummation of fraud ought not to be applied in a case having no element of fraud but in which the termination of the entryman's connection with the land was caused by act of God.

Furthermore, this court, through Mr. Justice Brewer,

proceeded to mention several acts of Congress seeming to recognize the validity of the departmental ruling or practice allowing a homesteader six months within which to commence residence on the land entered, and then expressly disclaimed any intention of passing upon the validity of that ruling or practice. The case was then decided upon the fact that "at the moment of filing that relinquishment, Dowman, the defendant, was a settler in occupation of the tract, and Moss, the plaintiff, made her application to enter." Under the uniform ruling both of the courts and of the Interior Department that in such contingency the right of the settler attaches *eo instanti* and bars out the right of the applicant at the land office, the land was awarded to Dowman. The decision could have been, and in fact was, based upon this principle only and the previous criticisms of the departmental practice, aforesaid, were therefore not necessary and might be termed *obiter dicta.*

In its last decision in the case of Fisher v. Rule and in the Noble decision (the latter being rendered shortly after the mandamus decision in U. S. *ex rel.* Rule v. Secretary of the Interior), the Department seemed to doubt the correctness of the application to said case by the court of the rule in Moss v. Dowman; also called attention to the fact that a large number of departmental decisions recognizing the rule were rendered both before and after the opinion in Moss v. Dowman; and finally referred to a number of legislative provisions enacted by Congress since the date of that decision pointedly recognizing this department rule, to wit, Joint Resolution of February 2, 1907 (34 Stat., 1421), Act of January 28, 1910 (36 Stat., 189), Act of February 13, 1911 (36 Stat., 903), and Act of June 6, 1912 (37 Stat., 123), known as the Three-Year Homestead Law.

Upon all these considerations the Department was convinced "that the propriety of the rule should not have been

considered upon its merits as an original proposition, but should have been recognized as an established practice of general recognition, and as having force in the nature of a rule of property."

Moreover, since none of the opinions of this court in Whitney v. Taylor, Adams v. Church and Moss v. Dowman was directly applicable to the facts of the present case they should not be held to require a change in a long settled departmental practice which has been recognized by statutory enactments, especially where that change would be applied retroactively and to the injury of one who for a period of years relied upon the previous practice. The decisions of both this court and of the Interior Department look with disfavor upon a sudden change in the departmental construction of an act of Congress, and the same should not occur in any doubtful case, nor without the most cogent and convincing reasons.

IV.

Appellant Has no Equitable Standing, as Well as Being Without the Legal Right.

It is undisputed in this case that appellant was under the age of twenty-one years at the time of first filing his homestead application and that he had not legally adopted the child whom he claimed to have taken under his control, nor was his application for such adoption filed until later. As to the *bona fides* of this adoption, we need only refer to the testimony of his father and attorney. (R., page 42.)

> "Q. How old was this little brother of the complainant at the time of this proposed adoption?
> A. Eight years old.
> Q. Had he been making his home with you?
> A. He was and has been all the time.
> Q. The complainant then has never taken him into the family except by means of adoption?

A. That is all.

Q. What is the complainant's business or what did he have at that time?

A. At that time he owned some live stock and other things to file on this land and ready to become a homesteader.

Q. Where was his property at that time, his live stock, etc.?

A. At the ranch which belongs to my other son.

Q. Some four miles away from this?

A. Yes.

Q. So far as you know then he never did anything for this little boy except to go to the County Judge and sign the adoption papers?

A. That is all."

The complainant and appellant himself testifies in this case to the following effect (R., page 56):

"Q. When did you first make up your mind to take this land or try to get it?

A. As soon as it was open to entry.

Q. Who suggested it to you?

A. I think I heard the report of the case when it was going on.

Q. Did your father suggest it to you?

A. I think I had spoken to him before that I would like to have a piece of land.

Q. Did he suggest to you that you had better try to take it; did he not prepare all your papers for you?

A. I do not believe he was the first to make the suggestion but he drew up the papers.

Q. Who do you think made the suggestion?

A. I think I did myself.

In addition, we suggest that there was no good reason shown for the adoption, as that the child's father was in poor health, or poor financial cricumstances, or other reason why his youngest son should be taken from his care and put under the control of an older son not yet of age.

There could scarcely be a stronger admission than this that the adoption was a mere form gone through for the purpose of enabling this appellant to make homestead entry of this land, which his father was probably disqualified to make, in order that the father's claimed preference right might be used by another one in the family—whether for the benefit of the father or not is immaterial. The youth "adopted" continued making his home with his natural parent and there was no change whatever in his manner of living whatever, or his prospects in life.

In the very similar case of Smith v. Drake (36 L. D., 133), the Secretary of the Interior found and held as follows:

> "Being under legal age, and therefore under the necessity of showing that he was 'the head of a family,' claimant, at the instigation of his father and attorney, hit upon the scheme of getting his little brother Glenn, age nine years, formally adopted as a member of his family, and in this scheme he had the cooperation and good offices of the judge of the probate court of Beaver County, Oklahoma, who formally issued a decree of such adoption. Claimant's father and mother appeared in court 'and voluntarily consented to the adoption of said child by the said Robert L. Drake.'
>
> "That the sole purpose of the adoption was to qualify the defendant to enter the land is made plain by the testimony of defendant's father, as well as defendant himself.
>
> * * * * * * * * *
>
> "Claimant's parents were both in good health. The father's age was forty-five years. He owned a farm of one hundred and sixty acres, situated near the land in question. He was also engaged in merchandising, doing a good business, and was postmaster at Dombey.
>
> "Claimant, at least up to date of the adoption of his little brother, had always lived with his parents and was supported by them. He then had no home

and owned no property and was in no condition 'to rear said child and furnish suitable nurture and education,' as gravely enjoined by the court.

"Besides being an acknowledged scheme to subvert the plain provisions of law, the decree of adoption, as shown by your office in citations from the Oklahoma statutes, was null and void. No provisions are made in said statutes authorizing a minor to adopt a child and the probate judge had no power to issue the decree of adoption.

* * * * * * * * *

"Claimant did exercise that supposed right by entering the land, but being then a minor he was disqualified, and as above seen his fraudulent attempt to show that he was the head of a family utterly failed."

As the facts here are almost identical with those in the case just cited, the opinion of the Interior Department as to the qualifications of young Fisher would, in all probability, have been adverse. By seeking to qualify himself by the fictitious proceedings of adoption, complainant has not come into equity with clean hands. Even if the correctness of all his other contentions were admitted he had no equitable standing to bring this suit. In a case decided at the last term of this court (Doepel v. Jones, 244 U. S., 305), in which the heirs of a homesteader, who had been guilty of fraud in the inception of his entry, were seeking to have the patentee declared to hold the land in trust for them, the court, through Mr. Chief Justice White, thus held:

"We are of opinion that the court below was clearly right in holding that, as the facts were admitted which absolutely destroyed the effect of the original Fearnow homestead entry, and therefore caused it to be impossible for that entry to be the generating source of rights in favor of the plaintiffs in error, no equitable rights arose in their favor growing out of the cancellation of that entry and the issue of the patent to the

> defendant in error. It seems superfluous to reason to demonstrate that no equitable right to hold the patentee as a trustee could possibly arise in favor of the plaintiffs in error, since the application to enter upon which they rely was in legal contemplation nonexistent, and hence could afford no basis for equitable rights of any character."

Similarly, the fictitious and fraudulent proceedings by which Allen G. Fisher's minor son sought to qualify himself as a homesteader could afford no basis for equitable rights of any character, even though both the equities and the legal right did not rest in the patentee of the land here involved.

Accordingly, we pray for an affirmance of the opinion of the Circuit Court of Appeals dismissing this suit.

Respectfully submitted,

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Of Counsel.

FISHER *v.* RULE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 78. Argued November 22, 1918.—Decided January 7, 1919.

To initiate a right under the homestead act a minor's application must show that he is the head of a family; and a general assertion that he is such, by reason of having adopted a minor child, but without stating the time, place or mode of adoption, or identifying the child, is insufficient for this purpose. P. 317.

When the Secretary of the Interior, after canceling a final homestead entry, has ordered a suspension of all action under the decision

pending a reconsideration of it, no adverse right may be initiated under the homestead law either by settlement and improvement or by filing a preliminary application, while the suspension remains in force. *Id.*

To fasten a trust on a patentee of public land, the plaintiff must show that the better right to the land is in himself; it is not enough to show that the patentee ought not to have received the patent. *Id.*

232 Fed. Rep. 861, affirmed.

THE case is stated in the opinion.

Mr. Homer Guerry, with whom *Mr. Allen G. Fisher*, *Mr. William P. Rooney* and *Mr. John B. Barnes* were on the briefs, for appellant.

Mr. Samuel Herrick, with whom *Mr. Edwin D. Crites* and *Mr. F. A. Crites* were on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by Fisher to have Rule declared a trustee for him of the title to certain land in Nebraska, for which Rule holds a patent under the homestead law of the United States. Fisher lost in the District Court and its decree was affirmed by the Circuit Court of Appeals. 232 Fed. Rep. 861.

The case presented by the record is as follows:

In 1904, when the land was public land, a son of Rule applied for and secured a preliminary homestead entry thereof at the local land office. Under the ruling then and for many years prevailing in the Land Department he had six months within which to establish residence on the land. During the early part of that period he died intestate without establishing such residence. The father was the only heir and as such, according to the ruling then and theretofore prevailing in the Land Department,

could acquire title under the son's entry without himself residing on the land. Shortly after the son's death he took possession under the entry, fenced the land, erected substantial buildings thereon, cultivated forty acres or more and pastured live stock on the remainder, but resided on an adjoining tract. In due course, after continuing his cultivation and improvements for five years, he submitted final proof at the local land office showing what he had done and made the payments required by law. In that connection his right to a patent was contested by one who, although making no claim to the land, insisted that the entry was extinguished *ipso facto* when the son died without establishing residence on the land, and that, if the entry was not thus extinguished, the father forfeited his rights thereunder by failing to make the land his own place of residence. The local officers held against the contestant and with the father, and that decision was affirmed by the Commissioner of the General Land Office. But when the matter came before the Secretary of the Interior that officer, conceiving that the settled rulings of the Land Department before noticed were not well grounded, sustained the insistence of the contestant, reversed the decisions of the local officers and the Commissioner and directed that the entry be canceled. 42 L. D. 62, 64. The father sought to have the matter reconsidered and, while at first his efforts were unavailing, a rehearing ultimately was granted. On the rehearing, of which the contestant had timely notice, the Secretary recalled his first decision, adhered to the prior settled rulings, dismissed the contest and directed that the entry be reinstated. 43 L. D. 217. It was under that decision that the patent was issued.

On receiving the usual notice of the Secretary's first decision the local officers complied therewith by canceling the entry on their records. Fisher, who knew of the entry and the contest, then presented an application to

enter the land as a homestead. The application, while disclosing that he was a minor and unmarried, asserted in a general way that he was the head of a family, and therefore a qualified applicant, by reason of having adopted a minor child.[1] The local officers called for a further showing respecting the asserted adoption and for the time being withheld action on the application. Before a further showing was made the Secretary of the Interior, who was being asked to reconsider his first decision, ordered a suspension of all action under that decision;[2] and of this Fisher was advised by the local officers. Subsequently Fisher produced a court order purporting to show his adoption of a younger brother eighteen days after his homestead application was presented, but, by reason of the Secretary's suspending order, no further action was had on the application until after the Secretary's last decision, when the application was rejected. During the continuance of the suspending order, and without the consent of Rule, Fisher went on the land, erected improvements and attempted to establish a residence there.

In no admissible view of these facts can this suit be sustained. Even if under a right construction of the homestead law Rule was not entitled to the patent—which we do not at all intimate—Fisher is not in a position to take advantage of the error. He cannot be heard to complain on behalf of the United States; and he has no such personal interest in the land as entitles him to complain on his own account. He acquired no right

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[1] There was no statement respecting the time, place or mode of adoption or the identity of the child. In Nebraska adoption seems to be controlled by statute, *Kofka* v. *Rosicky*, 41 Nebraska, 328, 342; and the statute apparently provides that only adults may adopt. Rev. Stats. 1913, § 1615.

[2] A second suspending order was made by the Secretary at a time when Rule was resorting to judicial proceedings in the District of Columbia.

by his homestead application. It never was allowed; nor could it reasonably have been allowed. As originally presented it did not sufficiently show that he was a qualified applicant, and his additional showing—whatever else might be thought of it—came after the suspending order had superseded the cancellation of the Rule entry and become an obstacle to the initiation of any adverse claim. Neither did he acquire any right by his attempted settlement after that order was made. The order was no less effective against that mode of initiating a claim than against the other. Its purpose was to preserve the *status quo* pending final action on the Rule entry. A settlement in opposition to such an order is nothing short of a trespass and confers no right under the public land laws. *Lyle* v. *Patterson*, 228 U. S. 211, 216.

It is a familiar rule that to succeed in such a suit the plaintiff "must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent." *Sparks* v. *Pierce*, 115 U. S. 408, 413; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647; *Bohall* v. *Dilla*, 114 U. S. 47, 50; *Lee* v. *Johnson*, 116 U. S. 48, 50; *Duluth & Iron Range R. R. Co.* v. *Roy*, 173 U. S. 587, 590; *Johnson* v. *Riddle*, 240 U. S. 467, 481; *Anicker* v. *Gunsburg*, 246 U. S. 110, 117.

Decree affirmed.